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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 492.

THE PEOPLE OF PORTO RICO, *Petitioner,*

vs.

RUSSELL & CO., Sucrs., S. en C., HORACE HAVEMEYER, FRANK A. DILLINGHAM, *et al., Respondents.*

BRIEF FOR RESPONDENTS.

FRANCIS E. NEAGLE,
Attorney for Respondents.

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TABLE OF CONTENTS.

	PAGE
NATURE OF THE CASE	1
HISTORICAL STATEMENT	3
STATEMENT OF FACTS	6
ARGUMENT:	
POINT I—The District Court of the United States for Porto Rico had jurisdiction and the amended motion to remand was properly denied	16
POINT II—The Act of July 8, 1921, does not apply to the respondents	31
POINT III—Act No. 49 of 1921 impairs the obligation of the contracts of August 26, 1914, and is of no effect	34
POINT IV—The law in question violates the requirements of the Organic Act that the rule of taxation in Porto Rico shall be uniform	46
POINT V—By Act No. 49 of 1921 the respondents are deprived of property without due process of law	78
POINT VI—The respondents are denied the equal protection of the laws by Act No. 49 of 1921	86
POINT VII—Act No. 49 of 1921 is in conflict with the Treaty of Paris	90
POINT VIII—Act No. 49 does not provide for any hearing or appeal before the taxes become fixed and is void	92
POINT IX—Act No. 49 of 1921 delegates to administrative officers the legislative function of levying the tax and is void	95
CONCLUSION	101

CASES.

	PAGE
Ainsa *v.* U. S., 161 U. S. 208	91
Antoni *v.* Greenhow, 107 U. S. 769	42
Baker *v.* Portland, 2 Fed. Cas. No. 777	91
Balzac *v.* People of Porto Rico, 258 U. S. 298	18
Board of Commissioners *v.* State, 155 Ind. 604	68
Bruett *v.* Austin Drainage, etc., Co., 174 Fed. 668	21
Camunas *v.* Porto Rico Railway, etc., Co., 272 Fed. 924	30
Caverly-Gould Co. *v.* Village of Springfield, 83 Vt. 396	70
Chancellor *v.* Elizabeth, 64 N. J. L. 502	68
Chapman *v.* Barney, 129 U. S. 677	20, 26, 27
Charles *v.* Marion, 100 Fed. 538	93
Chicago & N. W. Ry. Co. *v.* State, 128 Wis. 553	68
Columbia Digger Co. *v.* Rector, 215 Fed. 618	21
Cotting *v.* K. C., etc., Co., 183 U. S. 79	89
De Lima *v.* Bidwell, 182 U. S. 1	91
Detroit, etc., R. R. Co. *v.* Fuller, 205 Fed. 86	89
Dundee Mtge., etc., Co. *v.* School District, 19 Fed. 359	68
Ely's Adm'r. *v.* U. S., 171 U. S. 220	91
Empire Rice Mill Co. *v.* Neumond, 199 Fed. 800	21
Fajardo Sugar Co. *v.* Holcomb, 16 Fed. (2d) 92	29
Fletcher *v.* Peck, 6 Cranch 87	41, 76
Fourteen Diamond Rings *v.* U. S., 183 U. S. 176	91
Gallardo *v.* Havemeyer, 21 Fed. (2d) 1012	5
Gilman *v.* City of Sheboygan, 2 Black 510	68
Goico *v.* Russell & Co., 4 Fed. (2d) 7	21, 27
Great Southern, etc., Co. *v.* Jones, 177 U. S. 449	21, 26
Green *v.* Biddle, 8 Wheat. 1	41
Gulf, etc., R. R. Co. *v.* Adams, 9 Miss. 559	44
Gulf, etc., R. R. Co. *v.* Ellis, 165 U. S. 150	87
Gulf, etc., R. R. Co. *v.* Hewes, 183 U. S. 66	78
Hager *v.* Walker, 128 Ky. 1	68
Hall *v.* Wisconsin, 103 U. S. 5	42
Hamilton *v.* Wilson, 61 Kan. 511	68
Hoogendorn *v.* Daniel, 178 Fed. 765	75
Illinois Cent. R. R. Co. *v.* Decatur, 147 U. S. 190	69
Liverpool, etc., Nav. Co. *v.* Agar & Lelong, 14 Fed. 615	21
Londoner *v.* Denver, 210 U. S. 373	92
Louisville, etc., R. R. Co. *v.* Letson, 2 How. 497	21
McCulloch *v.* Maryland, 4 Wheat. 316	97
McLaughlin Bros. *v.* Hallowell, 228 U. S. 278	21

	PAGE
Metropolitan, etc., Co. *v.* Chicago, etc., Co., 87 Ill. 317	78
Mobile Gas Co. *v.* Patterson, 293 Fed. 208	76
Monongahela Nav. Co. *v.* U. S., 148 U. S. 312	78
Murray *v.* Charleston, 96 U. S. 432	43
Nashville, etc., Ry. *v.* Taylor, 86 Fed. 168	87
Norwood *v.* Baker, 172 U. S. 269	80
O. & C. R. R. Co. *v.* Portland, 25 Ore. 229	82
Parks *v.* Board of Commissioners, 61 Fed. 436	99
People *v.* Hagadorn, 104 N. Y. 516	76
People *v.* Rivera Zayas, 29 P. R. 423	25
People *v.* Wainwright, 205 App. Div. (N. Y.) 505	76
People *ex rel.* Doyle *v.* Austin, 47 Cal. 353	71
People of P. R. *v.* Fortuna Estates, 279 Fed. 500, certiorari denied 259 U. S. 587	20, 21, 25, 27
People of P. R. *v.* Havemeyer, 60 Fed. (2d) 10	1
People of P. R. *v.* Ramos, 232 U. S. 627	20
People of P. R. *v.* Rosaly, 227 U. S. 270	20
People of P. R. *v.* Russell & Co., 268 Fed. 723	4, 14, 34, 37, 73
Porto Rico Ry. L. & P. Co. *v.* Mor, 253 U. S. 345	19
Railroad Tax Cases, 13 Fed. 722	88
Redmond *v.* Commissioners, 106 N. C. 122	67
Richardson *v.* Fajardo Sugar Co., 241 U. S. 44	20
Roosevelt Hospital *v.* Mayor, etc., 84 N. Y. 108	70
Smallwood *v.* Gallardo, 275 U. S. 56	5
South Porto Rico Sugar Co. *v.* Sepulveda, 27 P. R. 310	27
Spencer *v.* Merchant, 125 U. S. 345	45
State *v.* New Orleans Nav. Co., 11 Mart. (La.) 309	71
State of Indiana *v.* Milk, 11 Fed. 389	76
State of Louisiana *v.* Ober, 34 La. Ann. 359	76
State Tax on Foreign-held Bonds, 15 Wall. 300	42
Thomas *v.* Gain, 35 Mich. 155	79
Tidewater Co. *v.* Coster, 18 N. J. Eq. 518	83
U. S. *v.* Moreno, 1 Wall. 400	91
U. S. *v.* Percheman, 7 Pet. 51	91
U. S. *v.* Willamette, etc., Co., 54 Fed. 807	75
Van Cleve *v.* Commissioners, 17 N. J. L. 574	98
Walsh *v.* Barron, 61 Ohio St. 15	82
Wilmington R. R. *v.* Reid, 13 Wall. 264	78
Woodruff *v.* Trapnall, 10 How. 190	39, 41
Worcester *v.* Georgia, 6 Pet. 515	92
Worsley *v.* Second Municipality, 9 Rob. (La.) 324	71

STATUTES.

PAGE

Compilation of Rev. Stat. & Codes of P. R., p. 88 26
Sec. 2960 ff 94

Compiled Stat., N. J., Vol. 3, p. 3916 22

General Laws, Mass., Vol. 1, p. 1070 22

Laws of N. Y., 1919, c. 408, Sec. 90 ff 22

Laws of P. R., 1908, Special Session, p. 44 ..... 7, 51, 84
Sec. 1 52
Sec. 3 ..... 52, 60
Sec. 12 ..... 8, 35, 36, 53
Sec. 15 ..... 8, 36
Sec. 21 53
Sec. 26 53
Sec. 27 53
Sec. 28 53
Sec. 29 ..... 54, 57
Sec. 31 ..... 54, 57

Laws of P. R., 1911, Act No. 74, p. 237 ..... 7, 51
Sec. 16 55

Laws of P. R., 1913, Extraordinary Session, Act No. 128, p. 54 ..... 7, 51, 84
Sec. 2 ..... 8, 36, 38, 47, 55
Sec. 6 ..... 36, 55
Sec. 7 ..... 8, 36, 38, 47, 55
Sec. 10 56
Sec. 11 ..... 36, 46, 47, 55, 65, 94
Sec. 13 ..... 8, 12, 34, 36, 50, 74
Sec. 15 ..... 56, 81
Sec. 19 56
Sec. 26 56
Sec. 31 56
Sec. 32 57

Laws of P. R., 1917, Vol. 2, p. 256 52
Sec. 1 58
Sec. 5 58
Sec. 8 59

Laws of P. R., 1921, Act No. 49, p. 366 ..... 1-5, 14, 31, 34, 35, 37, 40, 44, 48, 67, 68, 71, 77, 78, 85, 86, 87, 89, 90, 92, 94
Sec. 1 ..... 4, 31, 49, 95
Sec. 2 ..... 50, 66, 93, 95

PAGE

Laws of P. R., 1921, p. 876 ..... 52, 60
Sec. 3 61
Sec. 4 61
Sec. 7 61
Sec. 9 61
Sec. 10 61

Laws of P. R., 1925, p. 1024 52
Sec. 4 62
Sec. 6 62

Laws of P. R., 1927, p. 512 52
Sec. 4 63
Sec. 7 64

Laws of P. R., 1928, Act No. 50, p. 320 22

Laws of P. R., 1929, p. 212 52

Laws of P. R., 1929, p. 250:
Sec. 5 64

Laws of P. R., 1930, J. R. No. 18, p. 616 22

Purdon's Digest, Pa., 13th Ed., p. 2299 22

Rev. Stat. & Codes of P. R.:
Sec. 4154 74
Sec. 4329 75

31 Stat. at Large 77 (Foraker Act) 20

31 Stat. at Large 953 (Act of March 2, 1901) 20

36 Stat. at Large 1091, 1094 17

39 Stat. at Large 951 (Organic Act of P. R.) 2, 27
Sec. 2 ..... 37, 46, 78, 86
Sec. 41 ..... 16, 18, 19, 20
Sec. 42 16
Sec. 43 30
Sec. 48 5

44 Stat. at Large 1421 (Act of March 4, 1927) 5, 28

45 Stat. at Large 447 (Act of April 23, 1928) 5, 28

U. S. Code Annotated:
Title 28:
Sec. 41 17
Sec. 71 17
Sec. 225 30
Title 48:
Sec. 863 16
Sec. 864 16

TEXTBOOKS

	PAGE
Cooley, Taxation (4th Ed.):	
Sec. 31, p. 105	70
p. 184	96
p. 194	98
Sec. 136, p. 318	42
p. 2044	98
21 Corpus Juris 1111	75
33 Corpus Juris 411	90
32 Cyc. 647	78
37 Cyc.:	
p. 711-713	71
p. 725	96
p. 731	68
p. 736	67
Joannani, The Argentine Civil Code, p. 260	23
McQuillan, Municipal Corporations:	
Sec. 2018, p. 4329	71
p. 4378	79
p. 4455-4457	80
Walton, The Civil Law in Spain and Spanish America, p. 422	23
Wright, The French Civil Code, p. 342	23

MISCELLANEOUS

Constitution of U. S., Art. VI	91
Malloy, Treaties, Vol. 2, p. 1690	2, 90
22 Op. Atty. Gen. 546	91

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Respondents.

BRIEF FOR RESPONDENTS.

Nature of the Case.

There is before the court for review on certiorari the judgment of the Circuit Court of Appeals for the First Circuit entered on June 27, 1932 (R. 93), rehearing denied August 5, 1932 (R. 94). The case is reported in 60 Fed. (2nd) 10.

The judgment of the Circuit Court of Appeals affirmed the judgment of the District Court of the United States for Porto Rico entered December 21, 1931 (R. 69), dismissing on the merits a complaint seeking to recover $61,617.04, with interest thereon, alleged to be due under an Act of the Legislature of Porto Rico No. 49, approved

July 8, 1921, entitled "An Act fixing a tax on certain lands using waters from the Southern Coast Public Irrigation System, on which lands no tax whatsoever was levied under the Public Irrigation Law, and for other purposes" (Laws of Porto Rico 1921, p. 366).

The case was tried by stipulation before the District Judge without a jury upon an agreed statement of facts. No special findings of fact were made by the court, but merely a general finding that "upon the issues herein joined the court finds for the defendants and against the plaintiff" (R. 68).

The District Court held (R. 68):

1. That Act No. 49 of 1921 impairs the obligations assumed by the Government of Porto Rico under the contracts of August 26, 1914 (hereinafter described) and that those contracts are binding upon the People of Porto Rico.

2. That in so far as said Act applies to respondents, the same constitutes the taking of private property without due process of law.

3. That in so far as respondents are concerned, said Act violates the requirement of the Organic Act of Porto Rico (39 Statutes at Large 951) that the rule of taxation in Porto Rico shall be uniform.

4. That said Act is in conflict with the Treaty of Paris (Malloy, Treaties Vol. 2, p. 1690).

5. That said Act violates the prohibition of the Organic Act against unequal protection under the law.

6. That said Act is void for the reason that it delegates to administrative officers the legislative function of levying taxes.

7. That said Act is void in that it does not provide for any hearing or appeal before the taxes become fixed.

The Circuit Court of Appeals affirmed the judgment upon the ground that Act No. 49 of 1921 impairs the obligations of the contracts of August 26, 1914 (R. 89), and that it is void for the reason that it delegates to administrative officers the legislative function of levying taxes (R. 90).

The suit had been originally brought in the Insular District Court of the Judicial District of San Juan (R. 76) and was removed from that court to the District Court of the United States for Porto Rico. The Circuit Court of Appeals also held (R. 85) that this removal was properly made, holding that where the jurisdiction of a Federal court over a suit brought against a partnership depends upon diversity of citizenship, the question is to be determined by the citizenship of its members whether under the law of the place of its origin it is regarded as an entity and may sue or be sued in its partnership name.

Historical Statement.

When the Guayabal Dam (a unit in the Porto Rican south coast irrigation system) which impounds the waters of the Jacaguas River naturally flowing into the Caribbean Sea on the southerly side of the Island of Porto Rico, was being constructed in 1914, the People of Porto Rico made separate contracts with respondents' predecessor in title, Fortuna Estates, and with its lessors, José A. Poventud and others, owners of various ancient concessions to take water (both ordinary flow and torrential) from the Jacaguas River. By these contracts the Government agreed after the irrigation system was in operation to deliver the

water of the Jacaguas River to which the respondents are entitled from the water of that river stored behind the Guayabal Dam. Some of the water was to be let down the river in regular daily amounts and some to be taken if a surplus of it was found in the bed of the river.

Difficulties arose between the Government and the respondents as to the surplus water in the river bed covered by the contract with Fortuna Estates, the Government of Porto Rico claiming the right to sell it and the respondents denying that right. Respondents' contention was upheld by the District Court of the United States for Porto Rico and by the Circuit Court of Appeals for the First Circuit (*People of Porto Rico* v. *Russell & Co.*, 268 Fed. 723).

The Circuit Court of Appeals held that the old concessions are suspended while the contract in question remains in force, and that respondents' right to irrigation water while the dam exists depends solely on the contract.

After the decision of the Circuit Court of Appeals in October, 1920, the Legislature of Porto Rico passed Act No. 49 of 1921 (Laws of Porto Rico, 1921, p. 366), the avowed purpose of which is to compel the respondents to pay a special tax for the water which they receive by way of exchange under the contract with the Government of Porto Rico as is shown by the first section of the law, which reads as follows:

> "That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system."

In a suit commenced by the respondents in 1924 in the District Court of the United States for Porto Rico the Government was enjoined in June, 1926, from attempting to collect any tax under Act No. 49 of 1921. The Government appealed, and while the appeal was pending, Congress passed the Act of March 4, 1927 (44 Statutes at Large, 1421), which amended Section 48 of the Organic Act, by inserting therein the provision:

> "That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

This court held in *Smallwood* v. *Gallardo,* 275 U. S. 56, that all tax injunction cases pending at the time of the passage of the Act of March 4, 1927, whether in the District Court or on appeal, abated. Following the decision of this court, the Circuit Court of Appeals dismissed the injunction suit for want of jurisdiction (*Gallardo* v. *Havemeyer,* 21 Fed. (2d) 1012) (R. 67, ¶24).

On April 23, 1928, Congress passed an act for the relief of taxpayers whose suits had been dismissed by reason of the decision in *Smallwood* v. *Gallardo, supra.* This Act (45 Statutes at Large, 447) is as follows:

> "That if in any suit pending March 4, 1927, but since abated or dismissed solely by reason of the provisions of the Act entitled 'An Act to amend and reenact sections 3, 20, 31, 33, 38 and 48 of the Act of March 2, 1917, entitled "An Act to provide a civil government for Porto Rico, and for other purposes," as amended by an Act approved June 7, 1924, and for the insertion of a new section in said Act between sections 5 and 6 of said Act, to be designated as "5a"

> of said Act,' approved March 4, 1927, the taxpayer had prior to such date obtained an injunction restraining the assessment or collection of any tax imposed by the laws of Porto Rico after trial on the merits in the District Court of the United States for Porto Rico, or if in any such suit on appeal to the United States Circuit Court of Appeals for the first circuit the right of any taxpayer to an injunction restraining the assessment or collection of any tax imposed by the laws of Porto Rico had been decreed, the treasurer of Porto Rico shall enforce the collection of the tax so enjoined or decreed by a suit at law instead of by attachment, embargo, distraint, or any other form of summary administrative proceeding. Notwithstanding the provisions of any existing statute of limitations, any such suit may be instituted at any time not later than one year after the approval of this Act."

From and after the passage of this Act the People of Porto Rico could collect the taxes in issue here only by virtue of this United States statute, and this suit was brought under and because of that statute.

Statement of Facts.

Respondents, Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and H. B. Orde, are co-partners doing business under the firm name and style of Russell & Company, Sucesores, S. en C.

The partners own four tracts of land lying along the Jacaguas River known as Haciendas Fortuna, Cristina, Luciana and Serrano. They sublease from José A. Poventud and others two other tracts of land on the Jaca-

guas River known as the Haciendas Union and Placeres (Statement of Facts, §§2, 4, 12, 14, R. 60).

Appurtenant to each of these properties by virtue of certain concessions and royal decrees of the Kingdom of Spain and by user and prescription, are rights to take water for irrigation purposes from the Jacaguas River (Statement of Facts, §§5, 13, R. 60, 63). Respondents and their predecessor in title and their lessors had been for more than twenty years prior to August 6, 1914, taking and using water from the Jacaguas River for the irrigation of these haciendas whenever physically possible up to the aggregate amount of the concessions. This water was taken from the bed of the river through intakes built for that purpose (Statement of Facts, §§6, 15, R. 61, 64).

There are also appurtenant to all of these properties by reason of concessions and royal decrees of the Kingdom of Spain and by user and prescription rights to take for irrigation purposes torrential waters which may exist in the Jacaguas River without limit as to quantity, except as limited by the size and location of the torrential intakes established by virtue of the said concessions, royal decrees, user and prescription (Statement of Facts, §§7, 16, R. 61, 64).

The People of Porto Rico undertook the construction of a public irrigation system on the south coast of Porto Rico in accordance with the provisions of the Public Irrigation Law approved September 18, 1908 (Laws of Porto Rico 1908, Special Session, p. 44), as amended in 1911 (Laws of Porto Rico 1911, p. 237), and as further amended in 1913 (Laws of Porto Rico, Extraordinary Session 1913, p. 54). In the course of the work Porto Rico erected a dam for the impounding and storage of a part of the waters of

the Jacaguas River and of the Toro Negro River, which is known as the "Guayabal Dam" and extends across the bed of the Jacaguas River above the intakes which the respondents used for taking water for the irrigation of their properties (R. 30, Statement of Facts, §8, R. 62).

The Irrigation Law provided that the People of Porto Rico could condemn existing water rights (Laws of Porto Rico, Special Session 1908, Sec. 12, p. 52), in which case the fair value thereof would have been paid in cash to the owners. It was also provided that the owners of water rights could relinquish their concessions, have them valued either by mutual agreement or in the manner provided in the Irrigation Law and be paid the amount agreed upon, not in cash but by receiving credits upon their proportionate part of the expense of the construction and operation of the dam (Laws of Porto Rico 1908, Special Session, Sec. 12, p. 52; Sec. 15, p. 54; Laws of Porto Rico, Extraordinary Session 1913, Sec. 2, pp. 54, 56; Sec. 7, pp. 61, 63). If water rights were not condemned or relinquished, Sec. 13 of the Act of 1913 (Laws of Porto Rico, Extraordinary Session 1913, p. 72) provided:

> "Section 13.—In the case of any land carrying a water right or concession of which the source of supply is destroyed or impaired by the construction or operation of the irrigation system, which shall not have been relinquished or surrendered to The People of Porto Rico, such land shall be entitled to receive from the irrigation system an amount of water which is the reasonable equivalent in value of the said water right or concession.
>
> The Commissioner of the Interior is hereby authorized to negotiate with the owner or owners of such water rights or concessions, and with the owner

> or owners of any water rights or concessions heretofore relinquished or surrendered on condition that the lands to which they are appurtenant should form part of the irrigation district, and which lands have not been included by the Irrigation Commission, and the said Commissioner of the Interior shall be empowered to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof, which shall be delivered to the lands to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof, with the power on behalf of the Irrigation Service to enter into agreement with such owner or owners for the relinquishment to The People of Porto Rico of such water rights or concessions, and for the delivery to the lands to which the said water rights or concessions are appurtenant of such fair equivalent. Before entering into any such agreement the Commissioner of the Interior shall consult the Attorney General of Porto Rico as to the validity and legal status of the water rights or concessions involved. * * *"

Respondents' predecessor in title and lessors refused to relinquish their concessions and they were not condemned by the Government (Statement of Facts, §§9, 17, R. 62, 64). In view of such refusal the People of Porto Rico, acting in accordance with the provision of the Irrigation Law above quoted, entered into negotiations with Fortuna Estates and with the owners of the Haciendas Union and Placeres for the purpose of fixing the amount of water and the time, place and conditions of delivery thereof which the owners were to take after the Guayabal Dam was completed and in operation.

As a result of such negotiations it was agreed between the representatives of the Government and the owners that the water to which the haciendas were entitled by reason of the concessions, royal decrees, user and prescription—the validity and effect of which the Government did not attack and thereby admitted—should be taken thereafter partly in regular daily amounts, which were appreciably less than the amounts specified in the concessions and varied in the case of each property, depending upon the age of the concession, and the balance not delivered daily should be taken from any surplus waters that might exist in the Jacaguas River at certain specified places (Exhibit A, §§First, Second, Third, R. 31 ff.; Exhibit B, §§First, Second, Third, R. 47 ff.). The contracts also provided that torrential waters could be taken from the Jacaguas River, but the Government was not restrained from holding behind the Quayabal Dam such torrential waters as it was legally entitled to restrain (Exhibit A, §Fourth, R. 33; Exhibit B, §Fourth, R. 48).

Formal contracts covering the agreement of the parties were entered into on August 26, 1914 (R. 28, 44). The contract with Fortuna Estates was protocolized on June 8, 1915 (R. 27).

The two contracts are alike except for a variation in names and amounts. The material portions of the contract copied from the Fortuna Estates contract are as follows (R. 30 ff.):

> "Whereas, The People of Porto Rico has authorized and undertaken the construction of a public irrigation system, in accordance with the Public Irrigation Law approved September 18, 1908, and the amendments thereto, and has recently, in the construction of the said irrigation system, erected a

dam (known as the Guayabal Dam), across the bed of the said Jacaguas River above the said intakes which the said Fortuna Estates uses for taking water for irrigating its said four tracts of land in accordance with its said claim of right and The People of Porto Rico proposes to use the said dam for the impounding and storage of a part of the waters of the River Jacaguas and of the River Toro Negro, a stream rising on the north side of the main watershed of the Island of Porto Rico, whereby the source of supply of the waters which the Fortuna Estates claims to be entitled to by reason of the aforesaid concession, royal decrees and user for the irrigation of the four tracts of land aforesaid, may be interrupted and impaired; and

Whereas, said water rights and concessions have not been relinquished or surrendered to The People of Porto Rico, and said Fortuna Estates is unwilling to enter into any agreement or arrangement for the relinquishment or surrender of the said water rights and concessions; and

Whereas, the amount of water taken by the Fortuna Estates and its predecessors in title for the irrigation of said four tracts of land under its said claims of water rights varies from month to month in accordance with the rainfall in the watershed of the said Jacaguas River, so that it is impossible to determine in advance the exact amount of water to which the Fortuna Estates is entitled under the said claimed water rights for any fixed period of time, and The People of Porto Rico (notwithstanding the construction and operation of said Guayabal dam), is ready to deliver from the said Jacaguas River to the said Fortuna Estates the amount of water to which the latter may be entitled under its said concessions, but, in order to facilitate and make more certain the operation of the said dam and the

irrigation system of which it is a part, desires t
determine and agree upon an amount of wate
which, delivered regularly, may under all attendin
circumstances, be considered to be fair equivalen
in value for irrigation purposes of the amount o
water which the Fortuna Estates would under ordi
nary circumstances take and use under the sai
water rights and concessions; and

Whereas, the Commissioner of the Interior i
authorized and empowered, by Section 13 of th
amendment to the Public Irrigation Law, approve
August 8, 1913, after consulting with the Attorne
General of Porto Rico as to the validity and lega
status of the said water rights or concessions, t
enter, on behalf of The People of Porto Rico, int
agreement with the owner of the said water right
or concessions upon an amount of water equivalen
to the water taken and used under said water right
and concessions and as to the time, place and cond
tions of delivery thereof to the lands to which th
said water rights or concessions are appurtenant
and

Whereas, the Attorney General of Porto Rico ha
been duly consulted, as provided by said Act;

Now, therefore, in consideration of the premise
and of the covenants and agreements on the part o
each party hereinafter contained, said Acting Com
missioner of the Interior, in representation and o
behalf of The People of Porto Rico, do hereby cove
nant and agree as follows:

First. The parties hereto hereby agree that th
quantities of water specified in this paragraph, deliv
ered uniformly through the year, subject to the term
and conditions specified in this agreement, togethe
with the additional water the right to take which i
provided for or reserved in paragraphs Third an

> Fourth hereof, are the fair equivalent in value of the water which the said Fortuna Estates takes under and pursuant to the concessions and water rights claimed by it, and The People of Porto Rico will, subject to the conditions and limitations hereinafter specified and at the times, places and subject to the conditions of delivery hereinafter provided for, make delivery to the Fortuna Estates, for the irrigation of the said tracts of land hereinabove referred to, of the said amounts of water,''

The above excerpt shows that the Government of Porto Rico admitted the rights of the concession holders, and in order "to facilitate and make more certain the operation of the said dam and the irrigation system of which it is a part" agreed to deliver part of the water which respondents' predecessor in title and lessors owned, but not exactly as they had been receiving it in the past either in amount or at the same places in all cases. To cover the full amount of concession water which the concession owners were entitled to, the Government granted them the right to take additional amounts of water from the bed of the Jacaguas River at the Aruz Pump if surplus water was available there, provided, however, that if the Government undertook the development and utilization of such surplus waters in the Jacaguas River, the right of the owners was limited to an amount which equalled the difference between the amounts which they were entitled to take under the concessions and the amounts which they took under the contract in regular daily deliveries.

In addition, the concession owners reserved the right to take torrential waters from the Jacaguas River, but this reservation, it was provided, should not limit the Govern-

ment from restraining torrential flood waters if legally entitled to do so in the reservoir above the Guayabal Dam.

Subsequently the Government attempted to sell the surplus water belonging to the respondents, as successor in title to Fortuna Estates, which collected at the Aruz Pump and which the respondents were entitled to take both under their concessions and under the contract, with the result that suit was brought to enjoin the sale of such water and a final decree enjoining such sale was entered in the District Court of the United States for Porto Rico. On appeal to the Circuit Court of Appeals for the First Circuit, the decree granting the injunction was affirmed (People of Porto Rico *v.* Russell & Company, 268 Fed. 723).

In that suit respondents claimed the right to take this surplus water at the Aruz Pump by virtue of the old Spanish concessions and also by virtue of paragraph Third of the contract of August 26, 1914 (R. 33). The Circuit Court of Appeals held, however, that the old Spanish concessions are, while the contract remains in force, suspended, and that respondents' right to the water in question depended on the contract. That decision is binding upon the Government of Porto Rico. It was handed down on October 28, 1920.

At the next session of the Legislature of Porto Rico which convened on February 14, 1921, the Legislature passed Act No. 49 (Laws of Porto Rico 1921, p. 366), the purpose of which was to set at naught the contract between the People of Porto Rico and respondents' predecessor in title though it had been held valid by the Circuit Court of Appeals, and to nullify the old Spanish concessions, the validity of which has never been attacked, by making the respondents pay a special tax for the construction, mainte-

nance and operation of the irrigation system, to which they had not contributed before by reason of the fact that as their concessions had neither been condemned nor valued by agreement, their lands were not and could not be included in the irrigation district which was formed and the land in which was to pay for the expense of construction and operation of the irrigation system. The Government had not compensated the respondents for their water rights, but the Government sought by this law nevertheless to compel them to pay as those others paid who had had their concessions condemned or valued by agreement. The law is expressly directed against the owners of land having concessions recognized as valid and without whose consent the Guayabal Dam and reservoir could never have been put into operation.

The law seeks to tax the six estates covered by the two contracts of August 26, 1914. None of them received or receive water from the irrigation system for the contracts provide that the Government of Porto Rico "is ready to deliver from the *said Jacaguas River*" to respondents' predecessor in title and lessors the amount of water to which they were entitled under their concessions. There is no evidence of any kind anywhere in the record that in the delivery of this water a single facility of the irrigation system is used except that the water of the Jacaguas River to which respondents are entitled and which the Government agreed to deliver is held back by the Guayabal Dam.

None of them received the slightest bit of benefit from the irrigation system for the contracts of August 26, 1914, set forth in unmeasured words (quoted above) the express agreement of the parties that the water to be delivered after the Guayabal Dam was in operation was, considering the

changed circumstances and the possibility of greater uniformity of delivery, nothing more than the fair equivalent in value of the water which the concessionaires were entitled to take under the old Spanish concessions. This fair equivalent was approximately twenty-five per cent. less than the water which the respondents were entitled to take under their concessions for ordinary flow. They practically gave up their right to take torrential waters for which no equivalent was given by the Government.

The record is entirely documentary, consisting of the pleadings, an agreed statement of facts and the contracts between the concession holders and the Government.

POINT I.

The District Court of the United States for Porto Rico had jurisdiction and the amended motion to remand was properly denied.

Sections 41 and 42 of the Organic Act (39 Statutes at Large 965; 48 U. S. C. A. §§ 863, 864) in their pertinent parts provide:

> "Section 41.—That Porto Rico shall constitute a judicial district to be called 'the district of Porto Rico.' * * * The district court for said district shall be called 'the District Court of the United States for Porto Rico,' * * * Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States, and shall proceed in the same manner. * * * Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State,

Territory, or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of $3,000, and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid. * * *

Section 42.—That the laws of the United States relating to appeals, writs of error and *certiorari*, removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico. * * *"

Sections 41 and 71 of Title 28 of the United States Code (36 Statutes at Large 1091, 1094; 28 U. S. C. A. 41, 71), in their pertinent parts are as follows:

"Sec. 41. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects * * *.

Sec. 71. Any suit of a civil nature, at law or in equity arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original juris-

> diction, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. * * *"

Petitioner's amended motion to remand proceeded upon two grounds, one that the respondents constitute a Porto Rican civil partnership organized under the provisions of the Civil Code of Porto Rico; that this civil partnership has a juridical personality independent of the personality of its individual members, and hence there was no diversity of citizenship; and the other that the petitioner is the People of Porto Rico, which is said to be neither a citizen nor a subject, and therefore no diversity of citizenship exists.

The second ground was not pressed in the Circuit Court of Appeals nor was it pressed in the petition for the writ of certiorari.

Section 41 of the Jones Act, *supra*, extends the jurisdiction of the District Court of the United States for Porto Rico beyond that conferred upon District Courts of the United States in the continental United States. Jurisdiction in the true District Courts of the United States (*Balzac* v. *People of Porto Rico*, 258 U. S. 298, 312) upon the ground of diversity of citizenship is conferred where the suit is "*between* citizens of different States" or "*between* citizens of a State and foreign States, citizens, or subjects." The wording of Acts of Congress providing for jurisdiction of the District Courts on the ground of diversity of citizenship has been many times interpreted by the courts, and

Congress is presumed to be aware of those interpretations, hence when Congress came to define the jurisdiction of the District Court of the United States for Porto Rico it first conferred upon it *all* the jurisdiction that Federal courts in continental United States had, and then proceeded to enlarge it.

Congress did not enlarge the jurisdiction so as to take in cases "*between* citizens or subjects of a foreign State or States or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico," for such words might have prevented the People of Porto Rico from suing in the United States District Court there. Congress said that the enlarged jurisdiction of the District Court of the United States for Porto Rico should exist "where *all* of the parties *on either side* of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico." The intention of Congress by its words is plain in view of the legislative knowledge of the decisions of the courts.

Section 41 of the Jones Act was construed by this court in *Porto Rico Railway Light & Power Company* v. *Mor*, 253 U. S. 345, where the court said, at page 348, that

> "suit may be brought in the District Court if either party has the jurisdictional qualifications; that is, the act confers upon such party not merely the right to sue but the liability to be sued."

Under Section 41 of the Organic Act, therefore, it makes no difference whether the People of Porto Rico is or is not a citizen. The People of Porto Rico could have sued the respondents in the District Court of the United States for

Porto Rico originally and despite the rule in *People of Porto Rico* v. *Rosaly*, 227 U. S. 270, this court has indicated that in certain kinds of cases the People of Porto Rico might be sued (*People of Porto Rico* v. *Ramos*, 232 U. S. 627; *Richardson* v. *Fajardo Sugar Company*, 241 U. S. 44).

In the Foraker Act, the original Organic Act (31 Statutes at Large, 77, amended by the Act of March 2, 1901, 31 Statutes at Large, 953) it was provided that the District Court of the United States for Porto Rico should have jurisdiction in controversies "where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States." This wording, with the wording of Section 41 of the Jones Act set forth above, clearly shows that Congress intended the District Court of the United States for Porto Rico to have jurisdiction where all the parties on *one* side are within a certain defined class, and has never required, as it has in the case of the jurisdiction of true United States District Courts, that the parties on *both* sides shall come within a certain defined class.

The same questions with regard to jurisdiction that are raised in this case were raised by the People of Porto Rico in its petition for certiorari in the case of *People of Porto Rico* v. *Fortuna Estates*. This petition was denied (259 U. S. 587).

Petitioner asks this court to overthrow the long established rule that in the Federal courts the citizenship of a partnership is for purposes of jurisdiction the citizenship of its individual members, whether under the law of the place of its origin the partnership is regarded as an entity and may sue or be sued in its partnership name. *Chapman* v. *Barney*, 129 U. S. 677, 682; *Great Southern Fireproof*

Hotel Co. v. *Jones,* 177 U. S. 449, 455; *McLaughlin Bros.* v. *Hallowell,* 228 U. S. 278; *Bruett & Co.* v. *Austin Drainage Excavator Co.,* 174 Fed. 668; *Columbia Digger Company* v. *Rector,* 215 Fed. 618; *Empire Rice Mill Co.* v. *Neumond,* 199 Fed. 800; *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 505 (certiorari denied 259 U. S. 587); *Goico* v. *Russell & Co.,* 4 Fed. (2d) 7.

The only decision contrary to the above cases is *Liverpool, Brazil & River Platte Navigation Co.* v. *Agar & Lelong,* 14 Fed. 615, a Louisiana case, but that case was expressly repudiated by the same court in *Empire Rice Mill Co.* v. *Neumond, supra.* Both of these cases dealt with the civil law concept of a partnership as distinct from the common law concept.

Petitioner says that a Porto Rican partnership is not the same as an American partnership and that a Porto Rican limited partnership is more nearly analagous to a corporation than to a partnership. It claims that because a limited partnership is created by an agreement, because it may be created for a term which will not expire on the death or withdrawal of individual partners, because the general partners alone manage the affairs of the partnership, because the Porto Rican law makes it a juridical entity and because the members of the limited partnership may limit their liability, that, therefore, it is a corporation to all intents and purposes and should come within the rule laid down in *Louisville, etc., Railroad Co.* v. *Letson,* 2 Howard 497, that for Federal jurisdictional purposes the stockholders of a corporation are conclusively presumed to be citizens of the state under whose laws the corporation was created.

Porto Rican limited partnerships are no different in the respects pointed out above from limited partnerships in the United States. All of the things which may be done in the articles of a limited partnership in Porto Rico may be done in many of the states of the Union (Laws of New York 1919, Chapter 408, Sections 90 ff.; General Laws of Massachusetts 1921, Vol. 1, p. 1070; Compiled Statutes of New Jersey, Vol. 3, p. 3916; 2 Purdons Digest Pa., 13th Edition, p. 2299).

To support its claim petitioner attempts to retranslate various sections of the Code of Commerce and the Civil Code of Porto Rico, and wherever it finds the word "*sociedad*" or the word "*collectiva*" or the word "*comanditaria*" or the word "*anonima*" it declines to translate them as they have always been translated as "partnership," "general partnership," "limited partnership" and "corporation," respectively, but says the words cannot be translated into English.

Are all the legislators, translators, commentators and lawyers wrong?

Uniformly the words mentioned above are translated as "partnership," "general partnership," "limited partnership" and "corporation." Thus are they translated in the official text of the "Compilation of the Revised Statutes and Codes of Porto Rico," published in 1913 as Senate Document No. 813, 61st Congress. They are so translated in the English version of the Civil Code of Porto Rico, revised, adopted and published under the provisions of Joint Resolution No. 18 of 1930 (Laws of Porto Rico 1930, p. 616) by the Legislative Joint Commission created by Porto Rican Act No. 50 of 1928 (Laws of Porto Rico 1928, p. 320). This translation shows that all the members of the

Joint Commission were Bachelors or Doctors of Law, and that the Secretary of the Commission was a Bachelor of Law.

Walton in "The Civil Law in Spain and Spanish America," published in 1900 in Washington by W. H. Loudermilk & Co., translates the word "*sociedad*" always as "partnership" (p. 422).

In "The Argentine Civil Code," an official publication of the Comparative Law Bureau of the American Bar Association, published in 1917 by the Boston Book Company, Frank L. Joannani, the translator, translates the word "*sociedad*" uniformly as "partnership" (p. 260).

In "The French Civil Code," which is very similar to the Spanish Civil Code, the word "*société*" takes the place of the word "*sociedad.*"

E. Blackwood Wright, an English lawyer, was the Chief Justice of Seychelles, where the Code Napoleon was in force. In his "The French Civil Code," published in London by Stevens & Sons, Ltd., in 1908, he uniformly translates the word "*société*" as "partnership" (p. 342).

Can it be that words uniformly translated by Porto Rican, English and American lawyers into perfectly good legal English have suddenly become so different in legal meaning that they cannot now be translated?

Can it be, as inevitably follows from petitioner's contention, that there is under the civil law no partnership of any kind?

Petitioner's contentions run exactly counter to the record. The case was tried upon an agreed statement of facts, which says (R. 59):

> "Come now the parties by their undersigned attorneys and, for the purpose of the trial of this

action by this court and any and all appeals taken herein, stipulate and agree upon the following statement of facts:

* * * * * *

2. That the defendants, Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, H. B. Orde and Frank M. Welty, now constitute and at the time of the institution of this suit constituted the *civil agricultural limited partnership* of Russell & Co., Sucesores, S. en C. (formerly Russell & Co., S. en C.) organized under the laws of Porto Rico; that at all such times said Frank A. Dillingham was and is a citizen and resident of the State of New Jersey; said Horace Havemeyer, a citizen and resident of the State of New York; Edward S. Paine, a citizen and resident of the State of New York; Edwin L. Arnold, a citizen and resident of the State of Florida; Frank M. Welty, a citizen and resident of the State of Ohio, and H. B. Orde, a citizen of Great Britain and a resident of the Dominion of Canada" (Italics ours).

This stipulation was signed by James R. Beverley, Attorney General of Porto Rico and the present Governor of Porto Rico, who is an American, of which fact this court will take judicial notice. The stipulation is in English. There was no need for translation. The stipulation was made after the motion to remand.

The original complaint (R. 76) sets forth:

"The defendant is a *civil limited partnership* organized under the laws of Porto Rico. According to the information and belief of the plaintiff, the defendant firm or entity is made up of the following persons who have associated themselves for the

> carrying on of the business of cultivating sugar cane under the said name in general in Porto Rico: Frank A. Dillingham, Horace Havemeyer and William H. Morgan, as regular partners, and Frank M. Welty, Edwin L. Arnold and H. B. Orde, as silent partners, the plaintiff not knowing the residence and nationality of the stated persons'' (Italics ours).

This original complaint having been filed in the Insular District Court was probably in Spanish when filed. But the amended complaint was filed in the District Court of the United States for Porto Rico, and, therefore, was in English. It recites (R. 1):

> ''that the defendant is a *civil agricultural partnership* organized as a juridical entity under the civil laws of Porto Rico with capacity to sue and be sued'' (Italics ours).

In the amended motion to remand (R. 9) it is stated that

> ''* * * defendant in this case, as it appears from the complaint, is a *civil partnership* constituted under the provisions of the Civil Code of Porto Rico'' (Italics ours).

Petitioner quotes at length in its brief (p. 21) from the decision of the Supreme Court of Porto Rico in *People* v. *Rivera Zayas, District Judge,* 29 P. R. 423. The quotation is inapposite. The opinion was rendered on an appeal taken in the Insular Court from the order removing to the Federal Court the case reported as *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500 (certiorari denied, 259 U. S. 587). The Supreme Court of Porto Rico wrote an opinion in a matter which did not concern it, for it had no power

to pass upon a question of jurisdiction arising in the District Court of the United States for Porto Rico. It is interesting to note, however, that the court said (29 P. R. at 430), petitioner's brief page 23,

> "We need not, therefore, even decide in this case whether a *sociedad en comandita* is or is not a citizen."

All that the Supreme Court of Porto Rico held was that a *sociedad en comandita*—a limited partnership—is an entity distinct from the members that compose it and that as *the entity* was sued in the *Insular Court* and as it was organized under the laws of Porto Rico, *the entity* had no citizenship distinct from the People of Porto Rico or it had no citizenship at all.

A Porto Rico partnership, general, limited or with share capital is a juridical entity under the law of Porto Rico for the purpose of suing and being sued in the Insular courts. That, however, does not make such a partnership a corporation for purposes of Federal court jurisdiction. A Porto Rican partnership with share capital is more like a joint stock association than a corporation, but this court has held that a joint stock association is not a corporation for the purpose of conferring jurisdiction upon a Federal court (*Chapman* v. *Barney, supra*). Still less is a limited partnership a corporation, as this court has held (*Great Southern Fireproof Hotel Co.* v. *Jones, supra*). Porto Rico like the states of the United States has true corporations (Corporation Law of Porto Rico, Compilation of Revised Statutes and Codes of Porto Rico, p. 88).

We think that petitioner has shown no reason for the change by this court of its rule of decision laid down forty-

five years ago in *Chapman* v. *Barney, supra,* and uniformly followed.

Petitioner assumes that the case was removed from the Insular District Court to the District Court of the United States for Porto Rico upon the ground of diversity of citizenship. The record does not so show.

The petition in removal (R. 5) set out the citizenship and domicile of the respondents, then defendants, the fact that the amount in controversy exceeded the jurisdictional amount, the political nature of the People of Porto Rico, the citizenship and residence of the Treasurer of Porto Rico, and then stated that the suit was one in which the District Court of the United States for Porto Rico has original concurrent jurisdiction "in accordance with the United States statutes." The order of removal (R. 8) says that it is "in accordance with Section 28 of the Federal Judicial Code and the doctrine established in the cases, *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. Rep. 500; *Goico* v. *Russell & Co.,* 4 Fed. (2d) 7, and *South Porto Rico Sugar Co.* v. *Sepulveda,* 27 P. R. R. 310." The record shows no reason given by the Judge of the Federal Court for denying the motion to remand to the Insular District Court (R. 73).

The suit was removable as one of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, arising under the laws of the United States.

The original complaint shows (R. 76) that the people of Porto Rico "is a political entity invested with governmental powers, with capacity to sue, constituted by the act of the United States Congress approved the 2d of May, 1917, commonly called 'The Jones Law, or Organic Act of

Porto Rico'." Any suit brought by the People of Porto Rico is one which "arises under the Constitution or laws of the United States."

In addition, the suit was brought under the Act of Congress of April 23, 1928 (45 Statutes at Large 447), which required the collection of taxes, where the taxpayer prior thereto obtained an injunction which had been lost by reason of the act of March 4, 1927 (44 Statutes at Large 1421), by a suit at law instead of by attachment, embargo, distraint or any other form of summary administrative proceeding.

This Act of April 23, 1928, superseded and took the place of the methods otherwise available for the collection of taxes in Porto Rico where the one alleged to owe the taxes was one who had theretofore obtained an injunction which had been lost because of the Act of March 4, 1927, as interpreted by this court.

In the original complaint which was filed in the Insular Court on June 24, 1930, the following appears (R. 79):

> "V. The plaintiff alleges that subsequent to the year 1922 the Treasurer of Porto Rico has endeavored to collect from the defendant the corresponding taxes assessed accordant with the provisions of the said law No. 49 of 1921, and that the defendant has refused to pay them, notwithstanding repeated demands for payment; and that the defendant has repaired to the District Court of the United States for Porto Rico praying for and obtaining restrictive remedies which have prevented the plaintiff up to within a short time past from exercising its last resources to effect the collection of the said taxes and legal surcharges."

That allegation was included in the complaint simply and solely to bring the action within the scope of the Act of April 23, 1928, for otherwise it could not be brought.

A similar provision is found in the amended complaint (R. 5):

> "9. The plaintiff alleges that subsequent to the year 1922 the Treasurer of Porto Rico endeavored from time to time to collect from the defendant the corresponding taxes levied and assessed against lands of the defendant according to the provisions of said Act No. 49 of 1921 and that the defendant, though often requested, has failed and refused to pay said taxes or any part thereof, and has constantly obstructed the Treasurer of Porto Rico in the collection of said taxes by injunction suits in the District Court of the United States for Porto Rico and by other means."

The statement of facts in paragraph 24 (R. 67) is to the same effect, although more artistically worded.

In *Fajardo Sugar Company of Porto Rico* v. *Holcomb, Auditor*, 16 Fed. (2d) 92, at 96, the Circuit Court of Appeals after describing the structure of the Government of Porto Rico and referring to the Organic Act of Porto Rico, says:

> "* * * There is also a provision in Section 34 that:
>
> 'All laws enacted by the legislature of Porto Rico shall be reported to the Congress of the United States, * * * which hereby reserves the power and authority to annul the same.'
>
> If not thus annulled within reasonable time, there is a presumption that they are approved (citing cases).

> **The result is that all Porto Rican legislation now on the statute books is—in a very real sense, though indirectly—the output of our Federal Government. • • •**
>
> **• • • the Organic Act is nothing but Federal legislation, and Porto Rican legislation, approved expressly or impliedly by Congress, has exactly the same import."**

See also *Camunas* **v.** *Porto Rico Railway, Light & Power Co.*, **272 Fed. 924.**

It follows, therefore, that the case was removable either because of diversity of citizenship or because it was one arising under the laws of the United States.

If petitioner should succeed upon this jurisdictional ground alone and the case be remanded to the Insular courts of Porto Rico, the case would come up again to the Circuit Court of Appeals for the First Circuit, for that court has authority to review decisions of the Supreme Court of Porto Rico where the amount involved is Five thousand Dollars ($5,000) or more (28 U. S. C. A. §225(a), (d); 39 Statutes at Large 951, Sec. 43), and presumably would be decided upon the merits by the Circuit Court of Appeals in the same way.

It is for this reason undoubtedly that the petitioner on page 14 of its petition admits that the jurisdictional question presented by it may be of little or no importance in this particular case.

POINT II.

The Act of July 8, 1921, does not apply to the respondents.

The first section of the act in question here provides:

> "That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system."

There is no evidence in the record that the lands of the respondents which it is sought to tax "are supplied with water from the southern coast public irrigation system."

The Guayabal Dam impounds and stores part of the waters of the River Jacaguas which flows into the Caribbean Sea on the south coast of Porto Rico and the waters of the Toro Negro River which rises on the north side of the main water shed of Porto Rico (R. 30). This impounding and storage, the contracts provided, might interrupt and impair the source of supply of the waters of the Jacaguas River to which Fortuna Estates was entitled (R. 30).

The contract provided (R. 31):

> "The People of Porto Rico (notwithstanding the construction and operation of said Guayabal Dam), is ready to deliver *from the said Jacaguas River* to the said Fortuna Estates the amount of water to which the latter may be entitled under its said concessions, * * *"

The parties then agreed upon certain quantities of water which were "the fair equivalent in value of the water which the said Fortuna Estates takes under and pursuant to the concessions and water rights," and the People of Porto Rico agreed to "make delivery to the Fortuna Estates, * * * of the said amounts of water" (R. 31, 32).

The contract provided that the People of Porto Rico, when there was no storage water in the reservoir behind the Guayabal Dam, should deliver the quantities of water agreed to be delivered to Fortuna Estates "from the flow of the Jacaguas River exclusive of water added thereto from the Toro Negro River" (R. 35), and provided that the People of Porto Rico should have the right to divert from the reservoir behind the Guayabal Dam into the Juana Diaz Canal or any other canals of the irrigation system the amount of water flowing into the reservoir from the Toro Negro River or from any other sources than the Jacaguas River (R. 35).

We have quoted only from the Fortuna Estates contract because the other contract is the same except for names and amounts.

The scheme of the contracts is clear. The Government would impound all the waters to which respondents' predecessor in title and lessors were entitled. They would let this down so that the respondents could take it at respondents' intakes in amounts less than the concession amounts. If there was no Jacaguas River water behind the dam no water would be let down.

We submit that under the contracts the respondents were not supplied "with water from the southern coast public irrigation system."

The statement of facts is to the same effect (R. 65):

> "20. That the officials of the Government of Porto Rico charged with the compliance of the said contracts of August 26, 1914, have complied with the same in their entirety and the aforesaid properties designated hereinabove and in the amended complaint and answer as haciendas Fortuna, Cristina, Luciana and Serrano, Union and Placeres, have been supplied since the year 1915 and are now being supplied with water for the purpose of the irrigation of said lands from the Southern Coast Public Irrigation System pursuant to and under the terms of the said contracts of August 26, 1914, hereinabove referred to in paragraphs 10 and 18, but neither the defendants herein nor the said lands so hereinabove described have received during such time or any other time nor are they now receiving, nor have they been supplied, nor are they being supplied with any water for the irrigation of said lands or for other purposes from the said Southern Coast Public Irrigation System *except such waters as the said defendants* and the said lands were and are entitled to receive under and by virtue of the contracts of August 26, 1914, *hereinabove referred to.*" (Italics ours.)

We repeat that except for the admitted fact that the water of the Jacaguas River belonging to the respondents under the concessions is impounded behind the Guayabal Dam, there is no evidence in the record that the public irrigation system of Porto Rico is in any way used for the purpose of supplying the respondents with water.

POINT III.

Act No. 49 of 1921 impairs the obligation of the contracts of August 26, 1914, and is of no effect.

The Circuit Court of Appeals in *People of Porto Rico* v. *Russell & Company,* 268 Fed. 723, held that the rights of the respondents to water for the Haciendas Fortuna, Cristina, Luciana and Serrano, depend during its existence upon the contract of August 26, 1914, between Fortuna Estates and the People of Porto Rico (R. 28). As the water for Haciendas Union and Placeres is covered by the same form of contract (R. 44) it follows that the rights of the respondents as sub-lessees of Union and Placeres likewise depend for the purposes of this case upon the contract of August 26, 1914, between the owners of these properties and the People of Porto Rico.

At page 726 of its opinion in *People of Porto Rico* v. *Russell & Company, supra,* the court, after quoting Section 13 of the Act of August 8, 1913 (Laws of Porto Rico 1913, Extraordinary Session, p. 72) set forth above at page 8, said:

> "The power of the government officials to contract with the owners of water rights was, under this section of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value."

At page 729 the court said:

> "* * * we think it is apparent from a reading of the contract that their old concessions are suspended while the contract remains in force, and that, as it is still in force, their right to the water in question depends upon the contract."

In other words, while the contract exists, the Circuit Court of Appeals says respondents have no operable rights under their concessions. Whether or not the concessions could once have been taxed, certainly from the time of the decision of the Circuit Court of Appeals the concessions being suspended could not be taxed, yet they have been taxed for by the agreed statement of facts (Par. 21, R. 66) we find that the properties to which the concessions are appurtenant

> "are subject to all real property taxes levied by The People of Porto Rico for insular or municipal purposes, and all of such taxes levied from 1921 to date have been paid from year to year at the same rates paid by other properties, whether included in the Southern Coast Public Irrigation District, provided by the Irrigation Law, or not included therein, and whether the owners of the land have relinquished their concessions for irrigation waters or have not relinquished them."

The decision of the Circuit Court of Appeals was handed down in October, 1920, and in 1921, at the first session of the Porto Rican Legislature thereafter, Act No. 49 of 1921 was passed, the stated purpose of which is to compel respondents to pay a special tax for the water which they receive under the contract with the Government of Porto Rico from the Jacaguas River as an agreed equivalent in value of their rights under the concessions.

The Government could have condemned the water rights appurtenant to the properties in question (Laws of Porto Rico, Special Session 1908, Sec. 12, p. 52). Had it done this the owners would have been paid in cash, their lands would then have been included in the irrigation district and

would have borne part of the special assessment necessary to pay the cost of construction, operation and maintenance of the irrigation system which is levied by the Irrigation Law on all lands within the irrigation district. This the Government did not do, nor did it agree with the owners of the concessions for a voluntary relinquishment of the water rights for an agreed compensation, as it could have done (Laws of Porto Rico, 1908, Special Session, Sec. 12, p. 52; Sec. 15, p. 54; Laws of Porto Rico Extraordinary Session, 1913, Sec. 2, pp. 54, 56; Sec. 7, pp. 61, 63). If it had done this the lands would have been included in the irrigation district and the amount of the compensation agreed upon would have been credited upon the assessments made against those lands.

Defendants, however, as they had a perfect right to do under the law (Laws of Porto Rico, Extraordinary Session 1913, Sec. 13, p. 72), elected to retain their concession rights and to contract for and receive "an amount of water which is the reasonable equivalent in value of the said water right or concession", in which case the land to which the water right was appurtenant could not be included in the irrigation district and was not within the scope of the law and could not be made liable for any of the expense of constructing or operating the irrigation system because the law provided expressly that the total amount necessary to pay for the construction, operation and maintenance of the irrigation system should be "levied upon the lands at the time included within the" temporary or permanent irrigation district (Laws of Porto Rico, Extraordinary Session 1913, Sec. 6, p. 59, Sec. 11, p. 68).

The People of Porto Rico agreed to deliver the reasonable equivalent in value of the concession water and, in the

words of the Circuit Court of Appeals in the instant case (R. 88):

> "* * * the consideration therefor was the right acquired by the People of Porto Rico to carry out its irrigation scheme and operate its dam and hold back and store therein the waters of the Jacaguas River, which otherwise it could not do, for the Irrigation Act of 1908, as amended in 1911 and 1913, did not make any of the lands here in question a part of the irrigation district thereby constituted."

The Government of Porto Rico attempted to deprive the respondents of part of the water it had agreed to deliver to respondents' predecessor in title, Fortuna Estates, but by the decision of the Circuit Court of Appeals in *People of Porto Rico* v. *Russell & Co.*, 268 Fed. 723, the right of respondents to this additional water was sustained.

The attempt to deprive the respondents of the water to which they were entitled under the contract by administrative action having failed, the People of Porto Rico decided to rob them of the fruits of their contract by legislative fiat and passed Act No. 49 of 1921.

Section 2 of the Jones Act (39 Statutes at Large 951) provides:

> "that no law impairing the obligation of contracts shall be enacted."

If the concessions of respondents' predecessor in title and lessors had been condemned or voluntarily relinquished, they would have been paid in cash or by credit the value of the concessions and thereafter obviously they would benefit from the irrigation system and should pay for it. Under no circumstances would they have had

imposed upon them a burden greater than the benefit received, for the Irrigation Law was a special assessment law and expressly provided that only such lands should be included in the temporary irrigation district and in the permanent irrigation district as would receive by being made a part of the district "a benefit greater in amount than the total cost or burden imposed by law upon the said lands, as hereinafter provided" (Laws of Porto Rico, Extraordinary Session 1913, Sec. 2, p. 55; Sec. 7, p. 62).

As the Irrigation Law provided for the payment of the entire cost of the construction, operation and maintenance of the irrigation system by the lands in the temporary and permanent irrigation districts, it is clear that the governmental scheme did not contemplate that the owners of non-relinquished concessions who contracted for the delivery to them of an amount of water which was the fair equivalent in value of their concession water, should pay any part of the cost either of construction, operation or maintenance of the irrigation system. The contracts in question here were based upon that admitted premise.

In the court below it was urged that the possibility of a tax upon the owners of land who did not relinquish their concessions but made contracts for the delivery of a fair water equivalent such as that sought to be assessed by the Act of 1921 was in contemplation of the parties when the contracts were made, and on pages 47 and 48 of petitioner's brief in this court it is said:

> "But the Government regards the question whether the lands in question are specially benefited by the development and maintenance of the irrigation system, otherwise than by the mere delivery of the amount of water stipulated in the contracts as one for determination by the insular Legislature in

> its discretion, and one which that Legislature has in effect determined by the Act of 1921."

It necessarily follows from this statement of the position of the Government that year by year so long as the irrigation system exists the Insular Legislature may have a new thought upon the subject and may determine from year to year that in its opinion the lands in question are benefited more and more and should pay other or additional taxes.

Petitioner in its brief says (p. 39) that it

> "is more than willing that its actions under review in this case, as well as in all other connections, shall be judged according to the standard suggested in the opinion of this court in *Woodruff* v. *Trapnall,* 10 Howard 190, 207."

This court there said:

> "A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligations of the contracts of individuals. We shall naturally look to the action of a sovereign State to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals."

The only way in which the actions of the Government of Porto Rico in connection with the subject-matter of this case can be squared with its protestation quoted above from its petition is upon the theory that "justice" and "morality" can no more be translated into Spanish than petitioner can translate the word "*sociedad*" into English.

The respondents' predecessor in title and their lessors did not receive a penny from the Government. They merely

contracted for a fair equivalent of the water which they were entitled to receive and which the Government of Porto Rico could not prevent them from receiving. The Irrigation Law expressly provided that the lands in the irrigation district should not be burdened more than they were benefited and that the lands in the irrigation district should pay the total cost of the construction, maintenance and operation of the system.

The Irrigation Law, without expressly saying so, can only be read as a legislative statement that non-relinquished concession holders would receive no benefit from it for their lands could not be included in the irrigation district, and land could be included in the irrigation district only if it was benefited. The Act of 1921 which is in question here, however, attempts to make the respondents bear a share not only of the cost of maintaining the irrigation system but also the cost of constructing it, and not only the cost of maintaining and building the Guayabal irrigation project on the Jacaguas River, but also the cost of maintaining and constructing all of the irrigation and hydro-electric projects on the southern coast of the Island of Porto Rico, from none of which do they receive any benefit.

The law puts the respondents on a par with land-owners who receive waters from the irrigation service without ever having owned concessions and puts them at a disadvantage compared with those who had water rights which were condemned for cash or were relinquished for a price credited upon the annual assessment as it becomes due.

A clearer case of impairing the obligation of a contract could not be found. The Government says: "You have certain rights of which you cannot be deprived against your will except by condemnation, in which case you must be

paid. If you will, we will value your concessions and pay you the agreed value. It is our plan, as set forth in the law, to have those who have no concessions whose concessions have been condemned or relinquished, pay the cost of the construction and operation of the irrigation system. This cost will be no greater to them than the benefits they derive. If you do not wish to give up your concessions, we will not condemn them but we will deliver to you from the water which you own and which we wish to hold up an amount which is the fair equivalent in value, considering the various elements involved, of the water which you are now taking."

The concessionaire, relying upon the good faith of the Government, agrees to accept this fair equivalent. A formal contract is drawn. Almost immediately the Government attempts to take from the concessionaire and sell part of the water which it has agreed to deliver. This the concessionaire fights and is successful in the legal battle. In the legal battle the court held that under the contract the concessionaire had temporarily relinquished his concessions, so the Government said: "Because we have the power to tax, and because the power to tax is the power to destroy, we will make you pay by way of a tax for the water which belongs to you and which but for the contract we could not prevent you from taking."

Against this record of action the Government protests its belief in the application to it of a more scrupulous regard for justice and a higher morality than belongs to the ordinary transactions of individuals.

Will the courts allow any government so to act?

This court answered in the negative in *Woodruff* v. *Trapnall, supra; Fletcher* v. *Peck*, 6 Cranch 87; *Green* v. *Biddle*,

8 Wheaton 1, 92; *Hall* v. *Wisconsin*, 103 U. S. 5, and *Antoni* v. *Greenhow*, 107 U. S. 769, 795.

That this conception of sovereign morality enunciated in the early days of the Republic still exists is the view of the Circuit Court of Appeals, as shown by its opinion below (R. 89).

No Legislature can justify the impairment of the obligation of a contract by calling it an exercise of its power to tax. *Cooley* says:

> "The Federal Constitution provides that no state shall pass any law impairing the obligation of contracts. This restricts the state from passing laws relating to taxes which will violate existing contracts" (Cooley Taxation 4th Edition, Sec. 136, p. 318).

In *State Tax on Foreign-held Bonds*, 15 Wallace 300, at page 320, this court cogently said:

> "A law which alters the terms of a contract by imposing new conditions * * * is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contracts and it prevents their legal enforcement."

The City of Charleston passed an ordinance assessing a general tax on city stock, and by the ordinance the city was allowed to retain as a tax part of the interest due on the stock. The State court held that the ordinance did not impair the obligation of the contract between the city and the holder of the stock, as the possibility of such a tax was in the contemplation of the parties when the plaintiff bought his stock.

In *Murray* v. *Charleston*, 96 U. S. 432, the Supreme Court of the United States held that the ordinance was void, as it impaired the obligation of the contract between the parties. The court said at page 444:

> "We do not question the existence of a State power to levy taxes * * * nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. But the power is not without limits and one of its limitations is found in the clause of the Federal Constitution that no State shall pass a law impairing the obligation of contracts. * * * The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume."

Continuing, the court said at page 448:

> "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

Certainly the People of Porto Rico could not by the contracts of August 26, 1914, agree for a very valuable consideration received—the right to operate the Jacaguas River irrigation system—to give as a fair exchange a certain commodity, water, and at the same time mentally reserve the right to charge for that water by way of taxes.

Gulf etc. R. R. Co. v. *Adams,* 90 Mississippi 559, deals with a State statute which levied a privilege tax on railroads, which under their charters were exempt from State supervision as to rates within certain maximum and minimum limits. The Mississippi court held the statute unconstitutional as impairing the obligation of the charter contract. It said at page 605:

> "There are several things to be noted which we think demonstrate the unconstitutionality of this act in this respect beyond controversy. First. This additional privilege tax is an extraordinary tax, one over and beyond the usual privilege tax required to be paid by other railroads doing similar business in this state. Second. It is clear that the imposition of this privilege tax is an exaction made solely because of the enjoyment by the appellant of this contract privilege in its charter. It was not for the legislature to extend by the charter contract the privilege of regulating its rates within certain limits to this appellant with one hand, and then with the other, after the road had been built, practically take away the privilege by the imposition of its privilege tax. * * * Fourth. This $10 per mile additional privilege tax is a burden imposed on the corporation as a condition to its further exercise of the corporate right conferred by its charter. * * * we are constrained to declare that this legislation * * * violates both the contract clause of the constitution of the United States and the fourteenth amendment thereof."

There is striking similarity between this case and the one at bar. The tax provided by Act No. 49 of 1921 is an extraordinary tax imposed on account of an alleged benefit conferred by the state and not imposed on other landowners in Porto Rico. The tax is imposed solely because of the

enjoyment by the respondents of rights under contracts with The People of Porto Rico proceeding from rights anteriorly held which came from the King of Spain. In the case at bar the Legislature is attempting to take away with one hand what it has contracted to give with the other.

Petitioner contends that the Act of 1921 constitutes a declaration by the Legislature that the lands thereby taxed are specially benefited by the operation and maintenance of the irrigation system, at least to the extent of the taxes levied thereon by that act, and regards this determination by the Legislature as one which it was within its power to make and one which the courts will not disturb, at least in the absence of some showing that it is arbitrary and oppressive.

For this statement of principle petitioner relies on the case of *Spencer* v. *Merchant,* 125 U. S. 345. The case is not apposite for two reasons. First. The original special assessment law therein involved provided for fixing a certain district as taxable for the proposed betterment. Beterments were allocated to the land in the assessment area. Part of the assessments was paid. Part was not paid, because the proceeding had been declared invalid by the courts as to those who had not paid. Thereafter the Legislature directed the levying of an assessment *on the lands originally included in the assessment area which had not paid the tax, in the amount of the assessment first fixed against them.* The total of the two assessments was the total cost of the improvement. That is not the case here, for the total cost of the improvement and of its maintenance was at the time when the contract was made required to be paid by those in the irrigation district and is now required to be paid by them. The second reason why the

case is not in point is that the legislative act assessing the tax determined, as the opinion of this court shows, "absolutely and conclusively the amount of tax to be raised." In the case at bar a Legislature has not determined the amount of the tax to be raised, which is a legislative function and one which it cannot delegate.

The concession owners who contracted with the Government contracted in view of the provisions of the Irrigation Law, which provided for the payment by the lands in the irrigation district of the total cost of construction and maintenance of the irrigation system. To attempt now to collect from these contracting concession owners any part of the money necessary either for the construction or the maintenance of the irrigation system is beyond question an impairment of the rights which they have under their contracts and therefore invalid. Such was a holding both of the District Court and of the Circuit Court of Appeals.

POINT IV.

The law in question violates the requirements of the Organic Act that the rule of taxation in Porto Rico shall be uniform.

Section 2 of the Organic Act (39 Statutes at Large 951) constitutes the Porto Rico Bill of Rights and included in it is the provision "that the rule of taxation in Porto Rico shall be uniform."

Section 11 of the Irrigation Law of 1913 (Laws of Porto Rico, Extraordinary Session 1913, p. 67) provides for the tax which is to be assessed and levied upon any

"given tract of land included in the permanent irrigation district."

The Irrigation Law provided the manner in which the temporary and permanent irrigation districts should be formed (Sec. 2, p. 54; Sec. 7, p. 61), and only those lands included in the temporary or permanent irrigation districts and only those lands receiving benefit from the irrigation work were taxed. No lands were included in either the temporary or permanent irrigation district unless they would "receive by forming a part of the (temporary or permanent) irrigation district a benefit greater in amount than the total cost or burden imposed by law upon the said lands, as hereinafter provided" (Sec. 2, p. 54; Sec. 7, p. 61).

No tax is provided for in connection with the construction or operation of the irrigation works except upon land that is included in the irrigation district and is benefited more than it is burdened with taxes.

As the permanent irrigation district has been formed and as it does not, because it cannot by reason of the provisions of the Irrigation Law, include any of the lands in question here, we shall disregard the temporary irrigation district and confine ourselves to the permanent district.

The method of levying and assessing the taxes to be paid by the lands included in the permanent irrigation district is as follows (Sec. 11, p. 67):

The Treasurer calculates the amount of the interest and principal or sinking fund due upon outstanding irrigation bonds for the ensuing fiscal year and adds thereto the amount due upon credits for the ensuing year on account of water rights or concessions which have been valued or relinquished. He then adds the amount estimated by the Commissioner of the Interior as the probable cost of operat-

ing and maintaining the irrigation system for the ensuing year. There is then either added to or subtracted from this total the estimated amount of any deficit or surplus from operations for the current fiscal year and from this total there is then subtracted the amount estimated by the Commissioner of the Interior as receipts for the ensuing year from the sale of any water power developed in connection with the irrigation system and the amount estimated by the Commissioner of the Interior as receipts for the ensuing year from any other sources except from the issues of bonds and special assessments upon the land in the permanent irrigation district. To the total so determined the Treasurer adds 2% as a margin of safety and the amount thus determined constitutes the total sum to be assessed for the ensuing fiscal year *"and the same shall be levied upon the lands at the time included in the permanent irrigation district."* It is also provided that before the certification by the Commissioner of the Interior of the amount estimated by him as receipts from water power, the Commissioner may "if in his judgment it is advisable deduct from the amount thus estimated by him a sum not to exceed 25% of the said amount for the development and extension of the said water power." The section also contains a provision limiting under certain circumstances the amount of the assessment per acre that can be levied in any year.

It will thus be seen that the total cost of building and operating the irrigation system is made a charge upon the land benefited thereby and included in the permanent irrigation district.

From the time of the execution of the contracts of August 26, 1914, down to the passage of Act No. 49 of 1921,

on July 8, 1921, or for a period of seven years, no attempt was made by the Government of Porto Rico to collect taxes from the respondents upon the lands using the water covered by these contracts except the real property taxes levied on all property in Porto Rico for insular or municipal purposes which are described in paragraph 21 of the Statement of Facts (R. 66). This was for two reasons: First, because the lands were not included in the permanent irrigation district, and second, because the water the lands were receiving was being delivered to them in exchange for water which they owned and had theretofore enjoyed and as a fair equivalent in value thereof. As this water delivered under the contracts of August 26, 1914, was, by the words of the Irrigation Law and by the words of the contracts, only the fair equivalent in value of the water theretofore used under the concessions, the respondents could not have been required to pay a special assessment as such special assessments are levied only for benefits received and can only be supported as such.

Section 1 of Act No. 49 of 1921 provides:

> "that a *special tax* is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, *but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system.*" (Italics ours.)

Upon first reading of this section one would think that the Public Irrigation Law was a void law, because only part

and not all of the land receiving water from the irrigation system was taxed. If read, however, in connection with the Irrigation Law and particularly in connection with Section 13 providing for the delivery of a fair equivalent in value for unrelinquished concession water, it indicates a clear intent to make an exaction solely because of the enjoyment by the respondents of their contract rights, and in effect to levy a special assessment for the cost of construction and the up-keep of the irrigation system upon certain lands deriving no benefit therefrom.

It is apparent from the law that it is not a general property tax upon all land in Porto Rico, because it is expressly confined to lands "which for irrigation purposes are supplied with water from the southern coast public irrigation system," and as we show below, unless the tax is a special assessment for benefits received it must be levied generally upon all land in Porto Rico. If it is a special assessment it can be levied only upon lands which derive benefit from the public improvement.

By Section 2 of the Act of 1921 the Treasurer is first authorized to fix the total number of acres receiving water from the irrigation system, which shall include (1) tracts of land subject to taxation under the Irrigation Law for the purpose of reimbursing the cost of the irrigation work, that is, lands receiving benefit from the improvement and which should pay the cost thereof; (2) tracts of land whose right to the use of water the Irrigation Commission has acknowledged, or whose right has been acknowledged by the court in cases of appeal as rights acquired under prior concessions; (3) lands irrigated with water delivered in accordance with concessions which have not been relinquished or assigned and which water is delivered in whole or in

part at canals of the Irrigation Service, the acreage of which tracts are determined by dividing the number of acre feet of water received by these tracts by four; and (4) tracts of land irrigated with water delivered in accordance with concessions not relinquished or assigned, which water is taken in the river at the intake specified in the concessions, the acreage of which tracts is obtained by dividing the number of acre feet delivered by five.

The Treasurer then takes the amount estimated or certified to as estimated by the Commissioner of the Interior as necessary for defraying the cost of operation and maintenance of the Irrigation Service during the following fiscal year, adds thereto or subtracts therefrom any deficit or surplus for operating and maintenance expenses during the preceding fiscal year and divides the amount so determined by the total number of acres computed as provided, and the quotient constitutes the tax per acre which "shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system."

It is necessary here to state in some fair detail the provisions of the Porto Rico Irrigation Law which affect this case.

What is called the Public Irrigation Law consists of the original act approved September 18, 1908 (Laws of Porto Rico, Special Session 1908, p. 44 ff.), as amended by Act No. 74 of 1911, approved March 9, 1911 (Laws of Porto Rico, 1911, p. 237 ff.), and further and very largely amended and supplemented by Act No. 128, approved August 8, 1913 (Laws of Porto Rico, Extraordinary Session, 1913, p. 54 ff.). The law has also been amended or supplemented by acts

passed in 1917 (Laws of Porto Rico, 1917, Vol. 2, p. 256), in 1921 (Laws of Porto Rico, 1921, p. 876), in 1925 (Laws of Porto Rico, 1925, p. 1024), in 1927 (Laws of Porto Rico, 1927, p. 512), and in 1929 (Laws of Porto Rico, 1929, p. 212).

Properly conceived as a law authorizing an improvement, the cost of which should be borne by those receiving the benefit, the law has been allowed to become a toadstool burdening lands in the irrigation district with the cost of all sorts of additions, improvements and repairs not properly chargeable to the lands included in the district.

The original Act of 1908 provides in Section 1 for an appropriation for the construction of an irrigation system for the district situated approximately between the River Patillas on the east and the River Portugues on the west (p. 46).

The court may take judicial notice of the fact that in this district there have been constructed four irrigation dams and reservoirs, Guayabal, Coamo, Patillas and Carite. This is shown on official government maps.

Section 3 of the Act (p. 46) is as follows:

> "The proceeds of the sale of the bonds and all moneys accruing by reason of assessments of taxes and sales of water and power within the irrigation district shall, subject to the provisions of Section 29 of this act, be deposited in the Treasury of Porto Rico in a trust fund to be known as the 'Irrigation Fund,' which fund may be subdivided for statistical purposes as the Auditor may prescribe. All expenditures for the construction and maintenance of the irrigation system, and all payments of interest and principal of any debt incurred for the construction of the said system, shall be payable from the said trust

fund upon warrant of the Auditor, countersigned by the Governor."

Section 12 of the Act (page 52) authorizes the Commissioner of the Interior to initiate suits for the condemnation of any land or right embraced within the irrigation district.

Section 21 authorizes the Irrigation Commission which is set up by the act to fix the geographical boundaries of the irrigation district and to determine what irrigable land shall be included therein. The Section says that:

> "The Commission shall examine critically each tract or local sub-division of land which might be included in the district, with a view to determining what lands are of such a location and such a nature that they can be profitably and successfully irrigated under the said irrigation system. They shall include in the said district only such lands as in the judgment of the Commission, are so located and of such a nature *that they will receive by the placing of the water thereon a greater benefit than the total cost or burden imposed by law upon the lands as herein provided.*" (Italics ours.)

Section 26 (page 62) allowed an appeal to the courts from the decision of the Irrigation Commission as to what lands should be included in the irrigation district and the value of relinquished water rights and the amount of corresponding deductions from the taxes assessed upon the lands by reason thereof.

Section 27 provided that all lands in the irrigation district should be assessed a uniform amount per acre, and Section 28 (page 64) set up the method of determining the amount that would be assessed, which amount would in due course pay the principal of the irrigation bonds, pay the

interest due yearly, and pay the cost of operating the system.

Section 29 (page 68) provided that if water power should be developed in connection with the construction of the irrigation system the Executive Council was authorized to arrange for its utilization and exploitation as an integral part of the said irrigation system, and also provided that:

> "All profits accruing from said power shall be covered into the Irrigation Fund and applied to the decrease of annual assessments until all indebtedness incurred on behalf of the irrigation system has been fully paid, but the right and title to such water power shall remain in the Insular Government, and the income from said work, after all indebtedness has been paid, shall be covered into the Insular Treasury as Insular Revenues until further provision shall have been made by the Legislative Assembly."

Section 31 (page 70) provides that:

> "In the event that there remains in the Irrigation Fund any of the profits of the sale of the bonds for said irrigation system over and above the amount required for the completion of the construction thereof, the amount of said surplus and the whole of it shall be expended upon and devoted to the collection, conservation and distribution of additional waters for irrigation, manufacturing and municipal purposes, and the water so collected, conserved and distributed shall be sold for the benefit of the Irrigation District."

It will thus be seen that the original law fulfilled all the requirements of a special improvement law. No one could be burdened more than he was benefited. Those benefited

were to pay the cost of the project. None of the expenses to be incurred was to be met by a general levy.

The original plan was further carried out by the provisions of Section 16 of the Amendatory Act of March 19, 1911 (Laws of Porto Rico, 1911, p. 242), where after providing for an additional $1,000,000 of bonds it was enacted:

> "That to the payment of the interest and principal of the said bonds shall be devoted the revenues derived from special assessments levied for the respective fiscal years during the life of said bonds upon the irrigable lands included in the irrigation district, as provided in the Public Irrigation Law, and *the said tax or special assessment shall continue to be levied and collected until the principal and interest of the bonds provided for in this act shall have been paid.*" (Italics ours.)

The amendatory Act of 1913 (Laws of Porto Rico, Extraordinary Session, 1913, p. 54 ff.) largely expands the original Act of 1908. This act repeats in Section 2 the provision in the original act that only such lands shall be included in the temporary irrigation district as will receive "a benefit greater than the total cost or burden imposed by law upon the said lands, as hereinafter provided," and in Section 7 (page 62) it makes the same provision for lands in the permanent irrigation district.

It is provided in Section 6 (page 58) for the temporary district, and in Section 11 (page 67) for the permanent district, how the assessments to be levied on the lands in the respective districts shall be determined. Both during the existence of the temporary district and during the existence of the permanent district it is provided that there shall be assessed an amount sufficient to pay the principal

and interest on the bonds and the cost of the yearly operation of the system, and, in addition, it is provided that the assessments shall not exceed certain amounts per year per acre. Provision is made for appeal to the courts from the decisions of the Irrigation Commission as to what lands should be included in the permanent irrigation district (Sec. 10, p. 66).

Section 15 (page 73) expressly provides that each tract of land shall be liable only for its proportionate share of the taxes determined as described above.

Additional bonds are authorized by Section 19 (page 75), and Section 26 (page 78) provides

> "That to the payment of the interest and principal of the said bonds shall be devoted the revenues derived from special assessments levied upon the irrigable lands included in the irrigation district, as provided in the Public Irrigation Law, as amended, and as hereinbefore provided."

Section 31 (page 79) provides

> "If there shall be in the Irrigation Fund an insufficient amount to pay for principal, interest or other charges payable out of said Irrigation Fund, or if the said Irrigation Fund shall at any time become temporarily exhausted, then the Treasurer of Porto Rico may, in anticipation of the collection of assessments from either the temporary or permanent irrigation district, or in anticipation of the sale of bonds provided for herein, pay such charges out of any funds in the Treasury not otherwise appropriated, charging the same to the Irrigation Fund, and repaying the same out of the Fund when there are sufficient funds therefor, together with interest at four per centum per annum."

Section 32 of the 1913 Act (page 80) amends Section 31 of the Act of 1908 so as to read as follows:

> "Section 31.—In the event that there remains in the Irrigation Fund any of the proceeds of the sale of the bonds for the irrigation system over and above the amount required for the completion of the construction thereof, and for such other purposes for which bonds may be issued hereunder or under the prior Acts authorizing the issue of bonds on account of the irrigation system, such surplus proceeds shall be used for the payment of the principal falling due upon outstanding irrigation bonds at such time as the Executive Council shall determine, or in the event that all such bonds shall have been retired, then for such other purposes connected with the irrigation system as the Executive Council may determine."

This act again complied with the requirements of an act providing for a special improvement to be paid for by means of a special assessment upon those benefited. No one was included in the irrigation district and therefore taxable unless the Irrigation Commission had determined that his land received a greater benefit than the burden imposed upon it, and this decision of the Irrigation Commission could be reviewed by the courts. The amount of the cost of the improvement was to be levied upon those who benefited by it and only up to the amount of the benefit. All assessments paid by those in the irrigation district were to be used for the payment of the cost of the improvement. The 1911 Act provided that when this cost was paid the assessment should cease.

The court will remember that the original act provided in Section 29 that profits accruing from the sale of water

power should be used for the decrease of the annual assessments until all indebtedness on account of the irrigation system had been paid, and that thereafter such income should be covered into the Insular Treasury as Insular Revenues. This was a questionable excrescence on an otherwise carefully prepared law, and it had its baleful consequences.

By Act No. 23 of 1917 (Laws of Porto Rico, 1917, Vol. 2, p. 256) the Legislature stated in the preamble that a large amount of water ran to waste over the spillway of the Patillas Dam which could be stored by raising the height of the spillway and the ends of the dam, and also that the demand for electric power generated by the Carite hydro-electric power plant was greater than could be supplied by the existing installation, and it therefore enacted that the spillway of the Patillas Reservoir and the ends of the Patillas Dam be raised and that an auxiliary electric plant be constructed to insure the continuous delivery of power in the event that it became necessary to shut down the Carite hydro-electric plant for repairs (Sec. 1, p. 258).

To provide the necessary funds of $100,000 for the improvements at the Patillas Reservoir and $100,000 for the auxiliary electric plant at Patillas, $200,000 in bonds was authorized to be issued (p. 258).

Section 5 of the act provides (page 260):

> "That for the payment of the interest on the said bonds, as it falls due, and the payment of the principal, the good faith of The People of Porto Rico is hereby irrevocably pledged, and to the payment of the said interest and principal of the said bonds *there shall be devoted the revenues derived from special assessments levied upon the irrigable lands included in the irrigation district, as provided in the*

Public Irrigation Law and acts amendatory thereto, for the payment of principal and interest of bonds already issued for the construction of the said irrigation system." (Italics ours.)

Section 8 (page 262) provided

"That the works, improvements and extensions of certain parts of the irrigation system, authorized to be constructed, maintained and operated by the Public Irrigation Law, and Acts amendatory thereto, herein authorized to be constructed or carried out, are hereby declared to be works of public utility and to form and constitute an integral part of the said irrigation system as thus authorized, and subject to the same terms, conditions and limitations as to use, ownership and other lawful requirements, as though they had been originally authorized by and embodied in the said Public Irrigation Law, and Acts amendatory thereto, and all the profits accruing from the sale of the additional power to be developed by the auxiliary electric plant herein authorized to be built, shall be covered into the 'irrigation fund, trust fund', and applied to the decrease of the annual assessments to be made on the land included within the irrigation district, until all indebtedness incurred by the People of Porto Rico for purposes of the irrigation system, shall be fully satisfied; *Provided, however,* that the right and title to such additional water power and the ownership of the auxiliary electric plant shall remain in The People of Porto Rico, and the income from said auxiliary electric plant, after all indebtedness has been paid, shall be covered into the Insular Treasury as insular revenues, in accordance with the provisions of section twenty-nine of the Act of the Legislative Assembly of Porto Rico entitled 'An Act to provide for the construction of an irrigation system, and to provide revenues therefor;

> for the temporary appropriation of two hundred thousand dollars to begin such work, and for other purposes', approved the eighteenth day of September, nineteen hundred and eight."

The phrase "irrigation fund, trust fund", appears in this law for the first time. It is another way of describing the "trust fund to be known as the 'Irrigation Fund'" which is set up in Section 3 of the 1908 Act.

This 1917 Act imposed an additional cost upon the lands in the irrigation district for the extension of the Patillas Dam and Reservoir, without regard to whether this cost added to the cost of the irrigation system placed a burden upon the irrigation district greater than the benefit. That part of the act is questionable. Certainly that part of the act which provides for the construction of an electric generating plant, title to which was to be in the People of Porto Rico, but the expense of which was to be paid by the owners of the land in the irrigation district, was bad. The expense of this power plant should have been borne by the taxpayers of Porto Rico as a whole.

But the habit of loading upon the irrigation district expenditures made for the general benefit of Porto Rico had become fixed and so we find the Legislature in 1921 by Joint Resolution No. 47, approved July 23, 1921 (Laws of Porto Rico, 1921, p. 876), stating that the main distributing canals of the southern coast irrigation system needed repair, and stating that the sum of $100,000 provided for through the issue of bonds by the 1917 Act was insufficient to cover the cost of the auxiliary electric plant at Patillas, and finding also that it was considered advisable to provide a third installation for generating electric power, and therefore enacting that $150,000 should be advanced by the Insular

treasury to cover the expense of reconstructing main distributing canals of the irrigation system, and $100,000 for further expenditure upon the auxiliary electric plant at Patillas. This money was to be repaid by the irrigation system at the rate of $50,000 per year, $35,000 from the proceeds of the income from the sale of electric power produced by the Carite hydro-electric system, and the balance "from regular funds annually made available for the construction and operation of the irrigation system" (Sec. 3, p. 878).

Section 4 provided that in case the Treasury could not make such advance, bonds in the amount of $250,000 should be issued, and Section 7 (page 882) provides that:

> "for the payment of the interest on the said bonds, as it falls due, and the payment of the principal, the good faith of The People of Porto Rico is hereby irrevocably pledged, and the payment of the said interest and principal of the said bonds there shall be devoted the revenues derived from special assessments levied upon the irrigable lands included in the irrigation district, as provided in the Public Irrigation Law and acts amendatory thereto, for the payment of principal and interest of bonds already issued for the construction of the said irrigation system."

The expenses of issuing and selling these bonds were by Section 9 appropriated out of the unexpended balance of the "irrigation fund, trust fund." A similar appropriation for expenses of the sale of bonds had been contained in the 1917 Act.

Section 10 provided that the profits from the sale of power should be covered into the "irrigation fund, trust fund", and applied to the decrease of the annual assessments to be made on the land included within the irrigation

district until all indebtedness incurred for purposes of the irrigation system should be fully satisfied, but expressly provided that the title to the additional water power and the ownership of the electric plant should be in The People of Porto Rico and that the income from the electric plant after the indebtedness of the irrigation system had been paid, should be covered into the Insular Treasury as insular revenue. This law is subject to the same comment as was made in connection with the 1917 law.

By Joint Resolution No. 18, approved May 15, 1925 (Laws of Porto Rico, 1925, p. 1024) the Legislature found that the drainage course into which the waters overflow from the spillway at Patillas had sustained damage by reason of the overflows caused by the extraordinary floods of 1924, and that this damage was of such an extent as to require the immediate construction of works to protect the base on which the spillway rests. Bonds were, therefore, authorized to be issued in the amount of $125,000 to construct works to protect the spillway. Section 4 of the Act (page 1026) provides that to the payment of the interest and principal of these bonds:

> "there shall be devoted the revenues derived from the sale of electric power and from other incidental receipts of the system, and those derived from the special assessment levied upon the irrigable lands included in the irrigation district, as provided by the Public Irrigation Law and laws amendatory thereof, for the payment of the principal and interest of bonds heretofore issued for the construction of the said irrigation system."

By Section 6 (page 1028) the cost of issuing and selling the bonds was ordered paid out of the "irrigation fund, trust fund."

It will be noted that the moneys provided to be spent by the 1917, 1921 and 1925 acts are to be repaid by assessments against the owners of the lands included in the permanent irrigation district without regard to whether the benefit received is greater than the burden imposed and without allowing them in any way to be heard in opposition.

Emboldened by their success in charging against the owners of land in the irrigation district $250,000 in 1917, $250,000 in 1921, and $125,000 in 1925, the Legislature by Act No. 21, approved June 6, 1927 (Laws of Porto Rico, 1927, p. 512), authorized the issuance of $500,000 in bonds for the construction of work necessary to develop and use the water of the Toro Negro River for the purpose of developing water power and for the irrigation of lands included in the Public Irrigation System. Of this amount $100,000 was to be used as an advance in the construction of a third hydro-electric plant, such sum so advanced to be reimbursed as needed for the development of the work on the Toro Negro River.

By Section 4 of the Act (page 516) the good faith of The People of Porto Rico was pledged to the payment of the interest and principal on the bonds:

> "and there shall be applied to the payment of the aforesaid interest and of the principal of the aforesaid bonds all income from the sale of the electric power and from other sources incidental to the system and such as may be derived from the special assessments that may be made on the irrigable lands included in the Irrigation District, as provided by the Public Irrigation Law and by the laws amendatory thereof, for the payment of the principal and interest of bonds heretofore issued for the construction of the said irrigation system."

Section 7 of the Act (page 518) provided that moneys received for sales of water power to be developed from the works, the construction of which was authorized by the act:

> "shall be covered into the Irrigation Trust Fund and shall be applied to reducing the annual assessments to be made on the lands included within the Irrigation District, until all obligations contracted by The People of Porto Rico for purposes of the irrigation system shall have been fully paid."

The same Section provided that the additional water power and the ownership of the electric plants constructed under the Act should belong to Porto Rico and the revenue therefrom, after the obligations of the Irrigation system should have been paid, should be covered into the Insular Treasury as insular receipts.

Here again the Legislature provided no opportunity for the land owners in the irrigation district who are forced to bear this expense to be heard on the question whether the benefit to be derived therefrom was greater than the burden.

Again, in 1929 by Act No. 47, approved May 1, 1929 (Laws of 1929, p. 250), the further issue of $100,000 in bonds was authorized for the repair and reconstruction of the works of the southern coast irrigation system which were destroyed by the cyclone of September 13, 1928. Again the interest and principal on these bonds was provided to be paid for from the receipts of electric power and from the special assessments made on the lands included in the irrigation district (Section 5, p. 252).

Again, also, the land owners in the irrigation district who are taxed to pay the principal and interest of this additional expenditure were given no opportunity to be

heard upon the question whether this burden was equal to or in excess of the benefit received.

These acts from 1917 to 1929 imposed upon the owners of lands included in the permanent irrigation district a capital expense of $1,225,000, and interest thereon over a long period of years. Part of this money was used on the irrigation system. Part was used for hydro-electric plants making use of the water of the irrigation system, which hydro-electric plants and the power developed by them were specifically declared to be and to remain the property of the People of Porto Rico.

It is apparent from reading Section 11 of the 1913 Act (Laws of Porto Rico, Extraordinary Session, 1913, p. 67) that the owners of land within the permanent irrigation district are taxed by way of a special assessment in an amount sufficient to pay the total cost of constructing and operating the irrigation system, as provided for by the Public Irrigation Law of 1908, as amended in 1911 and 1913. The assessments made by these acts were valid because they were based upon a law which provided that the benefit from the improvement must be greater than the burden and each land owner affected could have his day in court. For the $1,225,000 authorized to be spent by the Acts of 1917, 1921, 1925, 1927 and 1929, the owners of land within the permanent irrigation district are unlawfully taxed in an amount sufficient to pay interest and principal upon the bonds issued thereunder.

Section 2 of Act No. 49 of 1921, which is the law in question here, therefore provides for a tax which is not necessary to defray any of the expenses for the construction or operation of the irrigation system.

If the tax levied by the law in question here were a special assessment the proceeds of the tax must be used to pay the cost of the improvement. To be levied as a special assessment it could only be levied if the benefit received was greater than the burden imposed, and the taxpayer must have the right to be heard on that proposition by the assessing body with the right of review in the courts.

The tax, however, as we have shown, is not necessary for the payment of the cost of the irrigation system.

Nevertheless, it is used not only for the payment of the cost of the irrigation system but also for the payment of the cost of constructing the hydro-electric plants provided to be built in the acts enacted subsequent to 1913. Act No. 49 of 1921 (page 368) expressly provides that the moneys collected under it by the treasury:

> "shall be covered into the Insular Treasury to the credit of a special trust fund known as the 'Irrigation Fund,' to be invested in the same manner and for the same purposes provided by the Public Irrigation Law and laws amendatory thereof."

If the taxes in question here are collected they will be used to pay for the cost of the irrigation system, from which respondents receive no benefit. They will be used to pay for building hydro-electric plants belonging to the People of Porto Rico, from which respondents receive no benefit. The large mass of property owners of Porto Rico

who receive no benefit from the irrigation system are not taxed.

Perhaps only the respondents in this case from among all those property owners in Porto Rico who receive no benefit from the irrigation system are taxed.

Upon the plainest principles of the law of taxation Act No. 49 of 1921 cannot be supported whether considered as a tax upon property or as a special assessment.

In 37 Cyc. 736, it is said:

> "Uniformity requires that all taxable property shall be alike subjected to the tax, and this requirement is violated if particular kinds, species, or items of property are selected to bear the whole burden of the tax, while others, which should be equally subject to it, are left untaxed. Further, it is implied that each tax shall be uniform throughout the taxing district involved. A state tax must be apportioned uniformly throughout the state, a county tax throughout the county, and a city tax throughout the city."

In *Redmond* v. *The Commissioners*, 106 N. C. 122, the court, in speaking of a constitutional provision that taxes should be uniform upon all property, says, at page 127:

> "We are of opinion that section 9, Art. 7, was not intended to apply the rules of uniformity and equality to the subjects which the Legislature might alone select for taxation, but that it requires that all property shall be taxed, and taxed in accordance with the said rules."

If it were otherwise the same court said:

> "* * * it would be in the discretion of the Legislature to unequally distribute the burden neces-

> sarily incident to government, and the worst species of class legislation would be tolerated."

In *Gilman* v. *City of Sheboygan*, 2 Black 510, at page 517, the court approved the following statement:

> "The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must extend to *all property* subject to taxation, so that all property may be taxed alike—equally—which *is* taxing by uniform rule."

See also:

Chicago & Northwestern Railway Company v. *State*, 128 Wisconsin 553, 603, 604;
Board of Commissioners v. *State*, 155 Indiana 604;
Hager, State Auditor v. *Walker*, 128 Kentucky 1;
Hamilton v. *Wilson*, 61 Kansas 511;
Chancellor v. *Elizabeth*, 64 New Jersey Law 502;
Dundee Mortgage, etc., Co. v. *School District No. 1*, 19 Fed. 359.

Certainly the tax attempted to be levied by Act No. 49 of 1921 is not uniform.

There is a well recognized exception to the rule of uniformity in the case of a tax which is a special assessment for a particular benefit as distinguished from a general tax levied to enable the taxing authority to meet the general expenses of government. As is said at 37 Cyc. 731:

> "The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes and not * * * to local assessments for improvements levied upon properties specially benefited thereby."

The distinction between a general tax and a special assessment is well expressed in *Illinois Central Railroad Company* v. *Decatur*, 147 U. S. 190 at 197:

> "Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. 'The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder.' * * *

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> "On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. In *Wright* v. *Boston*, 9 Cush. 233, 241, Chief Justice Shaw said: 'When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden.' In *McGonigle* v. *Alleghany City*, 44 Penn. St. 118, 121, is this declaration: 'All these municipal taxes for improvement of streets, rest, for their final reason, upon the enhancement of private properties.' In *Litchfield* v. *Vernon*, 41 N. Y. 123, 133, it was stated that the principle is, 'that the territory subjected thereto would be benefited by the work and change in question.' * * *"

To the same effect are *Roosevelt Hospital* v. *Mayor, etc., of New York*, 84 N. Y. 108 at 112; *Caverly-Gould Co.* v. *Village of Springfield*, 83 Vermont 396 at 404.

Cooley in Section 31, page 105, of his fourth edition on Taxation aptly makes the distinction in these words:

> "A special assessment is in the nature of a tax upon property levied according to benefits conferred on the property. The whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvement. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby;

> their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay."

What name is given by the statute to a levy is immaterial in determining whether it is a general tax or a special assessment. In *People ex rel. Doyle* v. *Austin*, 47 Cal. 353, it is held that if a statute calls that a tax which has the elements of an assessment it is an assessment. At page 358 the court says that an assessment and a tax

> "* * * are essentially different in their nature, and designating as a tax that which in its elements is an assessment, can have no effect in determining whether it is one or the other. The question must be decided by the nature of the imposition, and not by a mere name by which it is called."

To the same effect are:

> 37 Cyc. 711-713;
>
> *Worsley, et al.* v. *Second Municipality of New Orleans*, 9 Rob. (La.) 324, 333-334;
>
> *State* v. *New Orleans Navigation Company*, 11 Mart. (La.) 309, 324;
>
> 5 *McQuillan, Municipal Corporations*, Sec. 2018, page 4329, ff.

There is no possibility of doubt that Act No. 49 of 1921 is an attempt to lay a punitive tax upon land of a certain limited class and to support such enactment by calling it a special assessment for improvements. If the imposition is a special assessment it must be used to pay the cost of the improvement and must be based upon a corresponding benefit to the lands burdened, or it cannot legally be im-

posed. It is our contention that the lands of the respondents do not derive any benefit from the construction and/or operation of the irrigation system or the hydro-electric system, that what water is received is water belonging to defendants which the Government could be enjoined from restraining, and that the act in this aspect is invalid because it does not levy a general tax throughout the Island of Porto Rico to defray the governmental expenses resultant from the operation of the irrigation system and the hydro-electric system. In addition, we have shown above that the irrigation law provides for a tax upon the lands that are benefited—the lands in the permanent irrigation district—sufficient to pay the expense of constructing and operating the irrigation system and the hydro-electric system, and that the amount of the tax sought to be levied upon the defendants here is in no wise needed for either the construction or operation of the irrigation system or the hydro-electric system, although the money received from this tax is placed in the "Irrigation Fund" and is, by the words of the law, usable both for construction and maintenance.

Apart from torrential water respondents' predecessor in title and their lessors were entitled under the concessions to take for Fortuna, Cristina, Luciana and Serrano an aggregate of 12032.78 acre feet of water (Record, p. 33), and for Union and Placeres 1579.31 acre feet of water (Record, p. 49). The contract with Fortuna Estates provided that 8258.98 acre feet delivered uniformly throughout the year, together with the right to take additional water if and when available in the river bed, were "the fair equivalent in value of the water to which these properties were entitled under the concessions" (Record, p. 36). The amount of water delivered to Union and Placeres as the fair equiva-

lent was 946.55 acre feet (Record, p. 53). The reduction in the contracts of the amounts allowed by the concessions varied in the case of each estate and was, in the words of the court in *People of Porto Rico* v. *Russell & Company,* 268 Fed. 723, at 727;

> "grounded on the principle of equivalence, and the variation in the percentage to the different estates obviously rests on the order of suspension in times of shortage"

as shown in Schedule D on page 43 of the record.

The Government agreed when it made the contracts that the only benefit which the concession holders would obtain from the construction of the Guayabal Dam was in more uniform delivery of water, and as compensation for this sole benefit respondents' predecessor, Fortuna Estates, gave up approximately twenty-five per cent. (25%) of the water to which it was entitled, and the owners of Union and Placeres gave up approximately forty per cent. (40%) of their water.

It is not necessary for us to point out that the respondents' predecessor and their lessors received no legal benefit from the construction of the irrigation system for which they could be taxed by a special assessment. The contracts speak for themselves when they say that the lesser amounts of water, together with the additional water the right to take which, when and if available in the Jacaguas River bed is provided for, "are the fair equivalent in value of the water which" the concessionaires take "under and pursuant to the concessions and water rights claimed" by them (Record, pp. 36, 52).

The contracts by their very words bar all consideration of actual or legal benefit.

The District Court in the injunction suit said in its opinion:

> "The contracts provide for a fair exchange and nothing more, and I believe this fact alone is decisive of this case. Complainants agree to take certain stated amounts of water delivered daily by the Irrigation Service at regular times and places in place of the greater quantities of water to which it was entitled under its Spanish concessions but which were uncertain as to their amount and uniformity and depended upon the rainfall, while the People of Porto Rico as a consideration for getting the Spanish concessions out of the way and being able to go ahead with its proposed irrigation project agrees to give complainants certain specified amounts of water delivered uniformly from day to day. The parties specifically agree that the delivery of these specified amounts in equal daily quantities is the fair equivalent of the water to which they were entitled under its Spanish concession."

The contracts of August 26, 1914, are binding upon the parties by Section 13 of the Irrigation Law (Laws of Porto Rico, 1913, p. 72). Express authority was given to the Commissioner of the Interior to enter into the contracts in question, which authority could be exercised only after consulting the Attorney General of Porto Rico "as to the validity and legal status of the water rights or concessions involved."

Section 1058 of the Civil Code (Revised Statutes and Codes of Porto Rico, Section 4154, p. 718) provides that:

> "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations."

Section 1223 of the Civil Code (Revised Statutes and Codes of Porto Rico, Section 4329, p. 736) says that:

> "The validity and fulfillment of contracts can not be left to the will of one of the contracting parties."

In *Hoogendorn* v. *Daniel,* 178 Fed. 765 at 768, the court says:

> "If authority is needed upon a proposition so plainly founded on equitable principles, a case in point is Stewart *v.* Metcalf, 68 Ill. 109, in which it was held that, in the absence of fraud, a party to a written contract will be estopped from averring anything against the deliberate recitals and admissions contained in the same, especially when it will prejudice and work injury to others who have acted in good faith upon the belief of the facts as stated in the contract."

The general rule is well stated in 21 Corpus Juris 1111, where it says:

> "If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands."

Porto Rico as a sovereign is as much bound by principles of estoppel as an individual.

The words of the court in *United States* v. *Willamette, etc., Co.,* 54 Fed. 807, at 811, are as follows:

> "* * * where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith

> have so changed their relation to the subject-matter thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped. *Com.* v. *Andre,* 3 Pick. 224; *Cahn* v. *Barnes,* 7 Sawy. 48, 5 Fed. Rep. 326; *State* v. *Milk,* 11 Fed. Rep. 397; *Pengra* v. *Munz,* 29 Fed. Rep. 830; *Woodruff* v. *Trapnall,* 10 How. 190. No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. * * * when matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain. It was well said in *Woodruff* v. *Trapnall* that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

In *Mobile Gas Company* v. *Patterson,* 293 Fed. 208, 221, the court quotes with approval an earlier Circuit Court of Indiana case, *State of Indiana* v. *Milk,* 11 Fed. 389, 397, saying:

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel."

To the same effect are:

> *State of Louisiana* v. *Ober,* 34 La. Ann. 359;
> *Fletcher* v. *Peck,* 6 Cranch 87;
> *People* v. *Hagadorn,* 104 N. Y. 516;
> *People* v. *Wainwright,* 205 App. Div. (N. Y.) 505.

Respondents stand in the shoes of the original parties who contracted with the People of Porto Rico.

The respondents are receiving nothing more than they are entitled to receive under the terms of the contracts.

The consideration which moved the concession holders to make the contracts of August 26, 1914, was the very water which it is claimed constituted a benefit conferred on the defendants by the People of Porto Rico, the argument being that if the defendants get any water at all from the irrigation service they are receiving a benefit.

The People of Porto Rico instead of conferring a benefit upon the predecessor of the respondents and upon their lessors by making the contracts of August 26, 1914, was the recipient of a benefit. The recitals in the contract (Record, pp. 35, 51) show that the contracts were made in order "to facilitate and make more certain the operation of the said dam and the irrigation system of which it is a part." If the contract had not been made the People of Porto Rico would have been compelled either to let all the water in the Jacaguas River flow down the channel or pay for the concessions of Fortuna Estates and J. A. Poventud and his co-owners after condemning the concessions.

The attempted tax provided for by Act No. 49 of 1921 is indefensible either as a special assessment or as a general tax, and the District Court so held (Record, p. 68).

POINT V.

By Act No. 49 of 1921 the respondents are deprived of property without due process of law.

The Porto Rican Bill of Rights provides

> "That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty or property without due process of law." (39 Statutes at Large, 951, Sec. 2.)

The concessions from the Kingdom of Spain owned by respondents and by their lessors and the right thereunder to receive water from the Jacaguas River are valuable property rights.

In 32 Cyc. at page 647 it is said: "The term 'property' * * * extends * * * to every species of valuable right or interest, in either real or personal property, or in easements, franchises and incorporeal hereditaments."

Property is said, in *Metropolitan City Railway Company* v. *Chicago, etc., Railway Company*, 87 Ill. 317 at 324, to include "all rights and interest in real and personal property, and also in easements, franchises and incorporeal hereditaments."

That franchises are property is unquestionable.

> *Gulf, etc., Railroad Company* v. *Hewes*, 183 U. S. 66;
> *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312;
> *Wilmington R. R.* v. *Reid*, 13 Wall. 264.

Although it is the ruling of the Circuit Court of Appeals that the Spanish concessions of respondents and their

lessors are suspended while the contracts remain in force, it is nevertheless true that our right to take water from the Jacaguas River depends on the concessions and is simply embodied in slightly different form in the contracts of August 26, 1914. The difference is that so long as these contracts are in force we must look to them to ascertain the exact manner in which we are to receive and enjoy certain property granted to respondents by the Spanish Government.

If, however, the People of Porto Rico in any way diminish our rights to receive water under the contracts or impose a burden upon the receipt of that water, such diminution and such burdening constitute an impairment and confiscation of our rights both under the contracts and under the concessions.

The tax is in form upon the lands to which are appurtenant the concessions, but as a matter of fact the tax is upon the water itself and as such is a diminution of and burden upon our property rights.

That the basis of any special assessment is a corresponding benefit conferred by the taxing authority is elementary. In *McQuillan on Municipal Corporations*, Vol. 5, at page 4378, the author says: "* * * the fundamental theory that must be adhered to in imposing special assessments on property, and from which alone the right is derived to impose such assessments, is that such property derives a benefit from such improvement commensurate with the amount of the assessment imposed upon it." A violation of this principle in levying a special assessment constitutes the taking of property without due process of law.

The words of the court in *Thomas* v. *Gain*, 35 Mich. 155 at 162, are:

> "But it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses."

To the same effect is *Norwood* v. *Baker*, 172 U. S. 269.

If a special assessment for a public improvement exceeds the value of the benefit to the property assessed, it constitutes, as to the excess, a taking of property without due process of law. (5 *McQuillan Municipal Corporations*, pages 4455-4457). This principle the Public Irrigation law recognizes, as we show above.

In the case at bar, the People of Porto Rico, without the consent of the respondents' predecessor in interest and its lessors, could by express provision of the Irrigation Law have condemned the old Spanish concessions by paying the value which was fixed for them in condemnation proceedings. It did not do this.

The government could have arranged with the respondents' predecessor and their lessors for the relinquishment of these concessions at a price mutually agreed upon, which price would have been paid to the concession holders by credits upon the taxes due from them because of the inclusion of their lands in the irrigation district. The concession holders, however, were not willing to surrender their concessions, as is shown by the execution of the contracts.

The only thing left, therefore, was for the Commissioner of the Interior to enter "into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof, which shall be delivered to the lands to which the said water rights or concessions are appurtenant as the fair equivalent in value thereof * * * and for the delivery to the lands to which the said

water rights or concessions are appurtenant of such fair equivalent" (Laws of 1913, Extraordinary Session, p. 72).

This only recourse was availed of and by the contracts between respondents' predecessor and their lessors certain quantities of water to be delivered uniformly throughout the year, together with certain additional water to be taken when and if available in the river bed, were solemnly agreed to be "the fair equivalent in value of the water, which" the concession holders had the right to take "under and pursuant to the concessions and water rights" owned by them, and the People of Porto Rico solemnly agreed by notarial instrument to deliver this equivalent amount of water without equivocation and without reserving the right to tax it or the lands upon which it was used because of such delivery or such use.

In both contracts it was provided (paragraph Eleventh, Record, p. 37; paragraph Tenth, Record, p. 52) that the delivery to and use by the concessionaires of water in accordance with the terms and conditions of the contracts should not "in any event affect or modify the present existing status of the water rights and concessions" owned by the concessionaires, but that such delivery and use was to be made "in view of the modified physical conditions resulting in the bed of the River Jacaguas from the establishment of the public irrigation system, which on the one hand henceforth permit the delivery to and the use by the" concession holder "of a substantially uniform flow of water, as provided in this agreement, and on the other, modifies to some extent the use of the water heretofore made by the" concession holder.

The contracts were contracts of exchange, and were not meant, nor have they turned out to be, contracts whereby

the concession holders were in any way benefited by the irrigation system. On the contrary, the contracts resulted in the defendants receiving less water and being forced to resort to the courts in order to compel the People of Porto Rico to live up to the solemn agreements which they had obtained, not as a matter of right but as a matter of grace, from respondents' predecessor in title and from their lessors.

The words of the opinion in *O. & C. R. R. Co.* v. *Portland*, 25 Ore. 229, at page 240, are particularly pertinent:

> "* * * there are cases in which the exercise of the power of assessment becomes such a flagrant abuse that they (the courts) must interfere to prevent the confiscation of property. In this case it clearly appears that the property of the plaintiffs was in no way benefited by the alleged improvement, and hence there was no foundation for * * * the assessment of such property for its cost or any part thereof. Under such circumstances the enforcement of the assessment would be 'taking property without due process of law'."

In *Walsh* v. *Barron*, 61 Ohio State 15, the court says, at page 24:

> "Upon the admitted averments of the pleading the naked question here presented is, whether an assessment may be made upon the property of an owner for the cost of a public improvement, that is * * * in excess of the benefits conferred on it * * *. By no refinement of reasoning can it be construed to be anything else than the taking of private property for public use without compensation. According to the best considered of the modern cases and the most reliable authorities, an assessment, being

> sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, is necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement; more, however, cannot be exacted, without impairing the inviolability of private property, guaranteed by the constitution, or in other, if not more appropriate words, confiscating it."

In *Tidewater Company* v. *Coster,* 18 N. J. Equity 518, the court considered an act of the legislature authorizing a tax on owners of certain lands to be benefited by a proposed reclamation project which would cover the entire cost of the project. The court held the act void and granted an injunction restraining the carrying out of the plan, because the law did not limit the assessment to the amount of the benefits received. The court said at page 527:

> "If this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto,* will be taken for public use without compensation."

The same court clearly stated the principle that when a local improvement is to be put through the excess of the cost over the actual benefits to the property whose value is enhanced by the improvement must be borne by the public as a part of the general expenses of government. It is stated at page 528:

> "The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit; how, then, upon any principle of taxation,

> can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated not indeed by name, but by their description as the owners of certain lands. A legislative act, authorizing the building of a public bridge, and directing the expenses to be assessed on, A, B and C, such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated, to a public use."

Even if it could be said that the tax sought to be imposed here was in the nature of a special assessment, nevertheless it cannot be supported if the tax itself is analyzed.

Special assessments must be specifically evaluated as against the property benefited. The Irrigation Law as amended in 1913 provides for an assessment almost necessarily varying from year to year, depending upon (1) the interest on the outstanding bonds necessary to be paid, (2) payments upon the principal of the bonds necessary to be made, (3) amount of the sinking fund required by the terms of the bonds, (4) the estimated cost of operating the irrigation system for the ensuing year, and (5) the estimated deficit or surplus for the current year's operation. It is ludicrous to think that the benefits accruing to the lands in the permanent irrigation district so assessed will vary in the same way. In years of high taxes there may be a shortage of water and consequently less benefit to the land irrigated. In a year of low taxes there may be an excess of water and great benefit to the land irrigated.

In the same way, although the cost of the construction, maintenance and operation of the irrigation system is now borne and must continue to be borne by the lands in the permanent irrigation district, the tax assessed under Act No. 49 of 1921 on respondents' lands will vary from year to year and will necessarily have no relation to the year by year benefits from the use of the water.

Can such variable factors control in determining the amount of the cost of a special improvement, part of which cost is attempted by Act No. 49 of 1921 to be assessed against and collected from respondents?

In theory the benefits accruing to property from a betterment supporting a special assessment tax must be fixed before the tax is assessed. The Irrigation Law did not fix these benefits but provided that whatever the cost was and whatever the ratio between benefit and cost, nevertheless, the total cost, not only of construction but of operation, must be borne by the properties included in the permanent irrigation district. The cost of the improvement was, therefore, assessed against the lands in the permanent irrigation district. From that time on no other tax could be levied by way of a special improvement tax for the expense of constructing and operating the irrigation system.

Nevertheless, Act No. 49 of 1921 attempts to fasten on the respondents' land a part of the cost, the payment of which in full had theretofore been assessed against the property in the permanent irrigation district.

Beyond question Act No. 49 of 1921 attempts to levy a special assessment upon the respondents without any corresponding benefit received therefor. It constitutes a taking of the property of respondents without due process of law and is void. The District Court so held (Record, p. 68).

POINT VI.

The respondents are denied the equal protection of the laws by Act No. 49 of 1921.

The Porto Rican Bill of Rights (39 Statutes at Large 951, Section 2) provides:

> "That no law shall be enacted in Porto Rico which shall * * * deny to any person therein the equal protection of the laws."

As we have shown above in Point V, it is a well settled rule that the cost of local improvements in excess of the benefits actually derived by lands within the assessment area must be borne by the public at large through general taxation as one of the ordinary expenses of government. As we have also shown above, the total cost of the construction and operation of the irrigation system is imposed by the Irrigation Law on lands in the permanent irrigation district. Consequently there can be no further assessment based upon the theory that the irrigation system constitutes a betterment for which special assessment may be levied.

If no tax by way of a special assessment, other than the tax provided in the Irrigation Law, can be levied in connection with the irrigation system, then any tax that may be levied in connection with the irrigation system must be levied as a general tax which must apply uniformly.

The irrigation system undoubtedly provides benefits for growers of sugar cane who, unlike the respondents, do not have other sources of water. On such benefited class a special assessment up to the amount of the increase in value resulting to their lands from the construction and

operation of the irrigation system would be proper, but the imposition of the entire expense of constructing and operating the system on this class of benefited persons, irrespective of the benefits derived, produces an unreasonable classification of taxpayers and effects a deprivation of the equal protection of the laws. This defense against the special assessment provided for by the Irrigation Law was open to those whose properties were included in the permanent irrigation district.

Need we do more than merely state that Act No. 49 of 1921 has even less justification in law than the Irrigation Law itself? The Irrigation Law provided for a class benefited thereby which should pay the total expense of constructing and operating the system. So long as that law remains on the statute books no other law can be passed putting part of such expense upon a small class of property owners who receive no benefit from the improvement.

Act No. 49 of 1921 constitutes as to the respondents a denial of the equal protection of the laws.

In *Gulf, Col. & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, at 165, Mr. Justice Brewer said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Part of the opinion in *Nashville C. & St. L. Railway* v. *Taylor*, 86 Fed. 168, at 185 is:

> "When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens, and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty. That the prohibitions of that amendment are now regarded as protecting the citizen against a denial of the equal protection of the law, and against taking property without due process of law, under the power of taxation, is a proposition clearly deducible from the many causes in which that question has been considered. * * * Whether the question be considered upon principle or upon judicial authority, it might be well said, I think, that no power is more liable to abuse, or more destructive in its effect when exercised with an unequal and uneven hand, than the power of taxation. * * * When, in addition to the violation of the state constitution, the statute results in an arbitrary and oppressive discrimination in regard to a large class of citizens or a large species of property, it is such class legislation and such denial of the equal protection of the laws as renders it obnoxious to the fourteenth amendment."

The court in *The Railroad Tax Cases*, 13 Fed. 722, at 733, used these words:

> "The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. * * * Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form

> that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible."

Mr. Justice Brewer in *Cotting* v. *K. C. etc. Co.*, 183 U. S. 79, at page 106, said:

> "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

It is our contention that the tax attempted to be levied by Act No. 49 of 1921 was aimed solely at the land owned and leased by respondents. Such an arbitrary selection of those who shall pay a tax constitutes discriminatory legislation of the most aggravated sort.

In *Detroit, etc., Railroad Company* v. *Fuller*, 205 Fed. 86, it was held that a tax on the stock, bonds and other evidences of indebtedness of specially chartered railroad companies, when there was only one such company, was invalid as class legislation in violation of the fourteenth amendment to the Constitution.

It is evident that to the extent that property is not benefited by an improvement—and respondents' property is in no wise benefited by the irrigation system—the imposition of a tax on property which happens to lie near the scene of the improvement and not on other lands in the tax district, which in this case is the Island of Porto Rico, is an entirely arbitrary and unreasonable classification and is a denial, to those affected, of the equal protection of the laws.

Act No. 49 of 1921 does not even purport to apply to

property benefited by the irrigation system. It merely levies a tax on lands supplied with water from the irrigation system and which are not subject to the payment of the tax levied by the Irrigation Law to meet the cost of the irrigation system. There is not only no appraisal of benefit but the need for benefit is expressly denied.

Certainly Act No. 49 of 1921 sets up an unreasonable classification, produces unquestionable discrimination and is, therefore, void. The District Court so held (Record, p. 68).

POINT VII.

Act No. 49 of 1921 is in conflict with the Treaty of Paris.

By the Treaty of Paris, concluded on December 10, 1898, and proclaimed April 11, 1899, Spain ceded the Island of Porto Rico to the United States (*Malloy, Treaties,* Volume 2, page 1690). By this treaty the sovereignty of the Island was transferred and the obligations formerly of Spain became those of the United States.

In *33 Corpus Juris,* page 411, it is said:

> "Ceded territory forthwith comes under the complete and absolute sovereignty of the nation to which it has been ceded, and the allegiance of its inhabitants, and *the duty of protection to them,* devolves upon the new sovereignty." (Italics ours.)

It is an established principle of international law that when territory is ceded the property rights of the inhabitants will be protected by the new sovereign. Speaking of a Porto Rican situation, involving water rights similar to

those owned by defendants, it is said in 22 Opinions of the Attorney General 546, at page 548:

> "If at the time the treaty of Paris took effect the applicant had a completed and vested right to the use of the waters of the River Plata, that right will be respected by the United States."

This principle of international law is so well recognized that it will be enforced even if there is no express stipulation in the treaty of cession requiring property rights of inhabitants to be respected.

In *Ely's Administrator* v. *United States*, 171 U. S. 220, at page 223, the court said:

> "In other words, in harmony with the rules of international law * * * the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law would enforce before should be enforcible after the concession."

To the same effect are:

Ainsa v. *United States*, 161 U. S. 208, 220;
United States v. *Percheman*, 7 Peters 51, at page 86;
De Lima v. *Bidwell*, 182 U. S. 1;
Fourteen Diamond Rings v. *United States*, 183 U. S. 176;
United States v. *Moreno*, 1 Wall. 400, at 404.

By Article Sixth of the Constitution treaties are declared to be the supreme law of the land, and referring to a state law contrary to the provisions of a treaty, it is said in *Baker* v. *Portland*, 2 Federal Cases No. 777, at page 474:

> "* * * the treaty furnishes the law, and with that treaty no state or municipal corporation thereafter can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether."

In *Worcester* v. *Georgia*, 6 Peters 515, it was held that a state statute which conflicted with a treaty must be governed by the treaty.

As we have shown above, the Spanish concessions of respondents and their lessors constitute property, and Act No. 49 of 1921 effects a confiscation of that property. The act is clearly in contravention of the rights of respondents and their lessors secured to their predecessors in title by the Treaty of Paris, and the act must bow before that treaty. The District Court so held (Record, p. 76).

POINT VIII.

Act No. 49 does not provide for any hearing or appeal before the taxes become fixed and is void.

It is well settled in the law of taxation that property shall not be taken under a tax levy without the taxpayer having had an opportunity to be heard. A hearing is a necessary element of that due process which is guaranteed.

In *Londoner* v. *Denver*, 210 U. S. 373, the court dealt with a special assessment for the cost of paving a street upon which the taxpayer's property abutted. No provision was made in the law for a hearing, and the court said at page 385:

> "* * * where the legislature of a State * * * commits to some subordinate body the duty of deter-

> mining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

Charles v. *Marion,* 100 Fed. 538, dealt with a similar statute levying a special assessment for the cost of a street improvement. At page 542 the court said of this statute:

> "It provides for no notice and hearing to ascertain and determine the actual benefits specially received by the landowner by reason of such improvements * * *. Such legislation is unconstitutional and void, under both federal and state constitutions, because it constitutes a taking of property without just compensation, and is a denial of the equal protection of the law."

Act No. 49 of 1921 makes no provision for notice, hearing or appeal. It does not concern itself with the actual benefits to be received and the Legislature had no intention of having the tax based upon benefits received. The sole purpose of the Legislature was to penalize respondents.

The omission of provision in Act No. 49 for notice, hearing or appeal is not saved by the provisions of the General Tax Law relating to hearings. The only provision in Act No. 49 regarding the levy and collection of this tax is that contained in the last paragraph of Section 2 that

> "This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law."

This provision provides merely for the time of levy and collection and not for the manner.

Nor in the Irrigation Law itself (Laws of Porto Rico, 1913, Section 11, page 70) is there any provision which will aid. The provision in the main law is that the irrigation taxes shall be collected and the collection enforced as then or thereafter provided by law in the case of the collection and enforcement of other real property taxes. There is, therefore, nothing in the Irrigation Law expressly incorporating in it the provisions of the General Tax Law in regard to hearings (Compilation of Revised Statutes and Codes of Porto Rico, Section 2960 ff.). They are not included by reference because on the doctrine of *expressio unius* the inclusion of the provisions in the 1921 Act for levy and collection and in the 1913 Act for collection and enforcement necessarily excludes the incorporation of any provisions not mentioned.

By their very nature irrigation taxes are out of the category of general property taxes. Irrigation taxes do not depend upon the value of the land but are merely assessments upon land to pay a definite and determined expense of construction and operation dependent wholly upon benefits received.

Because of the absence of any provision for hearing and appeal Act No. 49 of 1921 is invalid as in contravention of the Bill of Rights. The District Court so held (Record, p. 68).

POINT IX.

Act No. 49 of 1921 delegates to administrative officers the legislative function of levying the tax and is void.

Section 1 of Act No. 49 of 1921 (Laws of Porto Rico, 1921, page 366), provides:

> "That a special tax is hereby levied in addition to other taxes already fixed by law, on all parcels of land which for irrigation purposes are supplied with water from the southern coast public irrigation system constructed and in operation pursuant to the provisions of the Public Irrigation Law and amendments thereto, but which under the present Irrigation Law in no way contribute to the payment of expenses for the maintenance of said system."

Section 2 provides the method by which the Treasurer of Porto Rico fixes the total number of acres receiving water from the irrigation system; provides for an estimate by the Commissioner of the Interior of the cost of operating and maintaining the irrigation system during each fiscal year; and then provides that the Treasurer shall divide the amount estimated by the Commissioner by the number of acres receiving water from the irrigation system; and the quotient it is said:

> "shall be and shall constitute the tax per acre which shall be levied during said subsequent fiscal year on all tracts supplied with water from the southern coast public irrigation system, and which in no other manner are subject to the payment of a tax to meet the cost of the said irrigation system.

> This tax shall be levied and collected by the Treasurer of Porto Rico at the same time as any other tax imposed by the Public Irrigation Law, * * *."

From the above it will be seen that Act No. 49 of 1921 gives the Treasurer of Porto Rico in conjunction with the Commissioner of the Interior the right in his absolute discretion to determine those who shall pay the tax, what the total amount shall be, and the rate. Not only does the act do this but in addition it gives to the Treasurer the right to levy. There could not be a more flagrant instance of delegation to administrative officials of the power to take private property in the guise of taxation.

The exercise of the taxing power is a function which is legislative and not administrative.

Legislative functions cannot be delegated to administrative officials.

In 37 Cyc., page 725, we find these words:

> "It is not competent for the legislature to delegate its power of taxation, wholly or in part, to either of the other departments of government, or to any individual, private corporation, officer, board, or commission."

In *Cooley on Taxation*, 4th Edition, Volume I, page 184, the learned author says:

> "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, admits of no exception. And it is applicable with peculiar force to the case of taxation. The people

> have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. The people have not authorized this department to relieve itself of the responsibility by a substitution of other agencies. The power to impose taxes being purely legislative, the legislature cannot delegate the taxing power, * * * either to the executive department of government or to the judicial department * * *."

The reason for the exercise, solely by the legislature, of the power to tax is found in the opinion of Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, at page 428:

> "The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse * * *."

The taxing act must not only lay down the method by which administrative officials are to assess the tax but it must fix the amount to be collected either as a sum certain or by selecting the subjects of the tax and declaring what the rate shall be.

We read in *Cooley*, Volume I, page 194:

> "The nondelegable powers, *i. e.*, the powers which cannot be delegated to merely ministerial or judicial officers, include the selection of the property to be taxed, * * * the fixing of the amount of the tax to be imposed, the fixing of the rate of taxation, * * *."

And again in Volume 3, page 2044:

> "* * * a levy is the legislative act, whether state or local, which determines that a tax shall be laid, and fixes its amount * * *. It is to be distinguished from an assessment, although sometimes the term is loosely used as including the assessment. The 'levy' fixes the subject and rate of taxation and is a legislative function; the 'assessment' consists in making a list of the taxpayer's property and fixing its valuation, and is quasi judicial."

A case almost directly in point is *Van Cleve* v. *The Commissioners*, 71 New Jersey Law 574. In this case the act under consideration authorized the levying of a sewer tax on a district in an amount, depending solely on the judgment and discretion of a commissioner, up to nine million dollars for construction and in an unlimited amount for maintenance. The ratio of assessment for maintenance was to be based on the amount of sewage discharged into the sewers. It was held that the act was unconstitutional and invalid as an attempted delegation of the legislative function of determining the amount of the tax. The court said at page 581:

> "Every system of taxation consists of two parts —the elements that enter into the imposition of the tax and the steps taken for its assessment and col-

> lection. The former is a legislative function, conserved by constitutional prescriptions; the other is mere machinery. The latter may be delegated to other than governmental agencies; not so the former. Matters of computation, appraisement, adjustment and such like, involving mere certainty of detail, follow the delegable power, * * *; but no element that enters essentially into the tax itself may be so delegated (citing *State* v. *Sickles,* 4 Zab. 125; *State* v. *Koster,* 9 Vroom 308; and *Munday* v. *Rahway,* 14 *Id.* 339) * * *: 'These decisions are precedents in our own courts, affirming the want of power in the legislative body in which the power of taxation is vested to delegate the authority to others to determine in its judgment or discretion the amount to be raised by taxation.' "

and again at page 583:

> "* * * this court is unequivocally committed to the doctrine that the legislature of this state, in which the governmental power of taxation resides, does not possess the power to delegate * * * the authority to determine, in its judgment or discretion, the amount to be raised by taxation, to which obviously must be added that such authority is in effect so delegated if such body may be empowered to levy taxes to the amount of an indebtedness to be incurred by it in its judgment or discretion."

In *Parks* v. *Board of Commissioners,* 61 Fed. 436, a case holding invalid an attempted delegation of the duty to levy special assessments, at page 437, appears the following language:

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> "Local assessments are an exercise of the taxing power. * * * The rule that legislative authority cannot

be delegated applies to local assessments, the same as to other taxes * * *.

* * * Can a tax be arbitrarily forced upon the taxpayers of a county, either by individuals or by officials in whose appointment they have no voice? The power of taxation is a power inherent in all governments. In a constitutional government, the people, by the constitution, confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It appropriates the property and labor of the people taxed. Unrestrained power of taxation necessarily leads to tyranny and despotism * * *.

* * * Of all the powers of government the one most liable to abuse is the power of taxation. If placed in hands irresponsible to the people of the district to be taxed, its abuse is a mere question of time. * * * There is no limit to the cost of these improvements, and the taxpayer is absolutely without means to check or control abuses that naturally follow arbitrary and irresponsible power over the property of others. The act is a plain violation of the principle of self-taxation, and a clear invasion of the right of property. The people, by the constitution, did not authorize the legislature to so jeopardize the right of property. The legislature is not the fountain—not the source—of power. Under our system of government the legislature can exercise only such powers as the people have delegated to that body, either expressly or by necessary implication, by the constitution. All rights not so delegated are retained by the people. The right to life, liberty, and property is among the inherent and inalienable rights that the people did not commit to the legislature. Constitutions are adopted and governments administered for the protection, and not for the destruction, of these reserved rights of the

people. *People* v. *Morris,* 13 Wend. 328; 1 Blackw. Tax Titles, §§15, 16. Illegal or oppressive taxation is destructive of the right of property, and is not government, under the constitution; but is misgovernment."

The best that can be said for Act No. 49 of 1921 is that the legislature desired to get money from the respondents and was not considering any constitutional limitations on the methods to be applied.

The court below held that the act was void because it delegated to administrative officers the legislative function of levying taxes (Record, p. 90).

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be affirmed.

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New York, January, 1933.